EDITOR'S NOTE

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No. 85-2010-CFX
Status: GRANTED

Title: United Steelworkers of America, AFL-CIO-CLC, et al., Petitioners
v.
Charles Goodman, et al.

Docketed:
June 6, 1986

Court: United States Court of Appeals for the Third Circuit

Vide:
85-1626

Counsel for petitioner: Gottesman, Michael H.

Counsel for respondent: Borish, Arnold P.

Entry	Date	Note	Proceedings and Orders
1	Mar 18 1986		Application for extension of time to file petition and order granting same until June 6, 1986 (Brennan, March 18, 1986).
2	Jun 6 1986	G	Petition for writ of certiorari filed.
3	Jun 6 1986		Appendix of petitioner United Steelwrks. of Am. filed.
4	Jul 3 1986		Brief of respondents Charles Goodman, et al. in opposition filed.
5	Aug 28 1986		Reply brief of petitioner United Steelworkers of America filed.
6	Sep 17 1986		DISTRIBUTED. October 10, 1986
8	Nov 4 1986	N	Motion of petitioners in No. 85-1626 to expedite consideration of the petition for writ of certiorari in No. 85-1626 filed.
9	Nov 10 1986		REDISTRIBUTED. November 14, 1986
11	Nov 19 1986		REDISTRIBUTED. November 26, 1986
12	Dec 1 1986		Petition GRANTED. The case is consolidated with 85-1626, and a total of one hour is allotted for oral argument.
			**********
14	Jan 2 1987		Order extending time to file brief of petitioner on the merits until January 29, 1987.
15	Jan 23 1987		Order further extending time to file brief of petitioner on the merits until February 2, 1987.
16	Jan 23 1987		The time for filing the Joint Appendix is extended to and including February 5, 1987.
17	Feb 5 1987		Brief of petitioners United Steelwrks. of America, et al. filed.
18	Feb 5 1987		Brief amicus curiae of United States filed. VIDED.
19	Feb 6 1987		SET FOR ARGUMENT. Wednesday, April 1, 1987. This case is consolidated with No. 85-1626. (2nd case) (1 hour)
20	Feb 5 1987		Brief amicus curiae of United States filed. VIDED.
21	Feb 14 1987		Record filed.
22	Feb 14 1987		Certified copy of original record, 11 boxes, received.
23	Feb 13 1987	D	Motion of The Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	Feb 23 1987		Motion of The Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
25	Feb 26 1987		CIRCULATED.

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No. 85-2010-CFX

Entry	Date	Note	Proceedings and Orders
26	Mar 9 1987	X	Brief of respondents Charles Goodman, et al. filed.
27	Mar 11 1987		Record filed.
28	Mar 11 1987		Certified copy of original record, box, received.
29	Mar 9 1987	X	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
30	Mar 23 1987		Lodging received. 10 copies. Box.
31	Mar 23 1987	X	Reply brief of petitioners United Steelwrks. of America filed.

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CLERK

85-2010

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; LOCAL UNION 1165, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; and LOCAL UNION 2295, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, DOCK MEEKS, DAVID DANTZLER, JR., and JOHN R. HICKS, III, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, and UNITED POLITICAL ACTION COMMITTEE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a labor union may be held liable for a violation of Title VII of the Civil Rights Act of 1964 or of 42 U.S.C. § 1981 solely because the union failed to make affirmative efforts to stop an employer's discrimination.

2. Whether, if a duty to make such efforts exists under Title VII or Section 1981, a union can be held liable for breach of that duty based on a finding that in filing grievances against the employer's alleged discriminatory actions, the union made the arguments (such as seniority) that it thought best calculated to win the grievances, but those arguments did not include an explicit allegation of race discrimination.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; LOCAL UNION 1165, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; and LOCAL UNION 2295, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, DOCK MEEKS, DAVID DANTZLER, JR., and JOHN R. HICKS, III, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, and UNITED POLITICAL ACTION COMMITTEE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The United Steelworkers of America, AFL-CIO-CLC, and its Local Unions 1165 and 2295, hereby petition for a writ of certiorari to enable this Court to review the judgment of the United States Court of Appeals for the Third Circuit in *Goodman, et al. v. Lukens Steel Co. et al.*, C.A. Nos. 84-1478 and 84-1509, entered on November 13, 1985.[1]

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[1] In addition to the parties identified in the caption, Lukens Steel Company was a defendant in the district court and an appellant in the court of appeals. The company has filed a separate petition for certiorari on other issues. *Lukens Steel Co. v. Goodman, et al.*, No. 85-1645. Respondents also have filed a petition for certiorari on other issues. *Goodman, et al. v. Lukens Steel Co., et al.*, No. 85-1626.

OPINIONS BELOW

The district court's findings of fact and conclusions of law are reported at 580 F. Supp. 1114. They are reproduced in the Appendix to this petition as Appendix B (50a-148a). The permanent injunction issued by the district court is unreported. It is reproduced as Appendix E (155a-159a).

The opinion of the court of appeals is reported at 777 F.2d 113. It is reproduced as Appendix A (1a-49a).

JURISDICTION

The district court issued a permanent injunction against the unions. On appeal the court of appeals affirmed that injunction. (3a, 34a). The court of appeals' judgment was entered on November 13, 1985. Appendix F (160a-161a). Timely petitions for rehearing were denied on January 7, 1986. Appendices G and H (162a-167a). By order of Justice Brennan dated March 18, 1986, the time for petitioners to file this petition for certiorari was extended to and including June 6, 1986. Appendix K (170a).

The district court's subject-matter jurisdiction was based on 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 2000e-5(f)(3).

This court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(c) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(c), provides:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

In 1973, respondents commenced this employment discrimination lawsuit on behalf of a class of black employees at Lukens Steel Company, which is a specialty steel manufacturer located in Coatesville, Pennsylvania. Named as defendants were Lukens Steel Company ("the company") and petitioners—the United Steelworkers of America, AFL-CIO-CLC, and its local unions 1165 and 2295 (collectively referred to as "the unions"). The unions are the exclusive bargaining representative for all of the company's hourly-paid employees.

Respondents asserted a large number of claims against the company, challenging a wide variety of its employment practices. Against the unions, they asserted three classwide claims: that the seniority system had been

negotiated and maintained for a racially discriminatory purpose; that the unions had discriminated against black employees in the processing of grievances; and that the unions had "passively permit[ted] the employer to discriminate against black persons." Respondents also alleged that the unions had committed acts of individual discrimination against three of the seven named plaintiffs. As we will fully describe, the courts below ultimately dismissed as unproven all of the claims against the unions except the claim that they had "passively permit[ted] the employer to discriminate against black persons." The legal sufficiency of the holding on that claim is the subject of this petition for certiorari.

At trial, the undisputed evidence showed that the company, like most other industrial employers, had complete control over all hirings, promotions, terminations, and other employment decisions. The only limits on the company's exercise of that control were limits imposed by statute and such limits as the unions were able to obtain in collective bargaining. The unions' only power regarding the company's employment practices was to file grievances alleging that the company was in violation of some existing provision of the collective bargaining agreement, or to negotiate for new contract provisions.

The hourly workforce was about 25 percent black during the relevant time period.[2] Because the local unions consisted entirely of employees at Lukens, and all employees were required by contract to join the unions, the local unions' membership had the same racial proportions

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[2] The district court fixed 1967 as the beginning date for claims under Section 1981, and April 1971 as the beginning date for Title VII claims against the unions. (58a). The court of appeals modified those rulings, holding that the statute of limitations for Section 1981 claims was two years instead of six, and also shortening the period for Title VII claims against the unions, thus making June 1971 the beginning date for all claims against the unions (7a-15a, 28a).

as the hourly workforce.[3] The district court found that blacks had "actively participated" both in local union meetings and affairs and in "the negotiations leading to each of the pertinent collective bargaining agreements." (71a, 133a). Undisputed evidence also showed that black employees had regularly been elected to high union offices, had frequently served as chairman of the union grievance committee, and had consistently served as union grievance representatives.

The record contains a huge volume of undisputed evidence about the unions' efforts to obtain non-discriminatory treatment for black employees, both throughout the steel industry and specifically at Lukens. These efforts included continuous efforts by the unions, from the late 1950's into the 1970's, to negotiate changes from the original system, under which management retained the complete unilateral power to place employees in the operating departments where they would work for their entire careers, culminating in the current system, under which job openings are posted and employees bid for transfers based on their full plant seniority. The undisputed evidence shows that one of the unions' primary reasons for actively championing these transfer rights was to make it impossible for employers in the steel industry, including Lukens, to continue their historical practices of consigning black employees to particular departments because of race.

The undisputed evidence also shows that throughout the industry and at Lukens, the unions exerted major efforts, through negotiations and through grievances, to eliminate non-job-related tests that management used as

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[3] Because the company historically had consisted of more than one corporation, two local unions are present. (59a-60a). Local 1165 is very substantially larger than Local 2295; at trial Local 1165 had 2600 members, while Local 2295 had only 80. (133a). The percentage of black members was also higher for Local 1165 than for Local 2295. (*Id.*).

a criterion for certain transfers and promotions. A wealth of evidence, consisting of contemporaneous documents as well as undisputed testimony, establishes that as early as 1965 one of the unions' primary reasons for attempting to eliminate such tests was the belief that many written tests disqualify more black employees than whites and thus tend to keep black employees from fully enjoying the transfer opportunities that the unions had negotiated on their behalf.

The evidence also contained a large volume of testimony that it was the union's policy to oppose individual acts of discrimination that occurred at Lukens and to seek redress for the victims through grievances or otherwise. Some of respondents' witnesses complained that although grievances had been filed on their behalf in an effort to remedy company actions that they believed discriminatory, the unions had not included explicit allegations of racial discrimination in those grievances. Union officers—including some who were members of the plaintiff class—testified that it was sometimes better to base a grievance on a specific provision of the contract, such as the seniority clause, rather than on the contract's general non-discrimination clause. They testified without contradiction that in their experience the company was less willing to settle grievances that included allegations of discrimination, and that they were often more successful in getting what the grievant wanted—such as a promotion, or backpay—if they omitted the claim of racial discrimination when there was another clear contract provision that would provide full satisfaction of the grievance.

After the trial, the district court issued a lengthy opinion containing its findings of fact and conclusions of law. With respect to the respondents' claims against the company, the district court found that respondents had not proved discrimination against the class in a number of respects, including wages, promotions and transfers to

bargaining unit jobs other than craft jobs, and discipline and discharge of nonprobationary employees (72a, 81a, 101a). On the other hand, the district court found class-wide discrimination by the company in several other practices, including the use of tests that had a disparate impact on black employees and discharges of probationary employees (87a-90a, 103a, 146a-147a).

With respect to the unions, the district court rejected all of respondents' claims that the unions had committed acts of discrimination against black employees. The court found that no discriminatory motive had entered into the negotiation or maintenance of the seniority system, held that respondents had proved no pattern of discrimination in the unions' handling of grievances, and rejected each of the individual claims of union discrimination (70a-72a, 133a, 135a-137a, 148a). In addition, the district court found that the unions' representation of black employees in grievances had effectively remedied the instances of disparate treatment that occurred in the company's day-to-day decisions on work assignments, shift differentials, and overtime. (91a, 93a). Similarly, the court found that through grievances the unions had "adequately protected blacks covered by the collective bargaining agreement [*i.e.*, non-probationary employees] from discrimination in discharges." (101a).

The only claim on which the district court found union liability was the claim that the unions had "passively permit[ted] the employer to discriminate." The district court found liability on this claim because of "repeated failures . . . to include racial discrimination as a basis for grievances or other complaints against the company." (137a). The court based that conclusion on three subsidiary findings. The first of those findings was that the unions knew that the company discharged black probationary employees at a disproportionately higher rate than whites, but did not file grievances over those discharges because of "a uniform policy of not filing griev-

ances on behalf of probationary employees, for any reason." (137a). The second subsidiary finding was that "the unions did object to Lukens' use of tests of all kinds [but] never based their opposition on the assertion that the tests had racially disparate impact . . . ." (*Id.*)[4] The third of these subsidiary findings was that the unions had generally been "reluctant to assert racial discrimination as a basis for a grievance." (138a). The court credited union officers' testimony explaining that when a grievance could be soundly based on a specific contract provision, such as seniority, allegations of racial discrimination were not only unnecessary but at times were counter-productive, because the company tended to "get its back up" when discrimination was alleged, thus impeding successful resolution of the grievance. (138a). Nonetheless, the district court found that a more vigorous pursuit of discrimination claims "as such" in grievances "would have focused attention upon racial issues and compelled some change in racial attitudes." (138a).[5]

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[4] In briefing to the court of appeals, respondents effectively conceded that this finding must be interpreted to mean that the unions did not include a claim of racially disparate impact in their *grievances* against the tests. The undisputed evidence already discussed, *supra*, at 6, established that the unions had argued in *negotiations* at the industry level and in *negotiations* at Lukens that the tests adversely affected black employees, and Lukens definitely understood these arguments. (*See* 90a). It was also undisputed, however, that the unions had not included a disparate-impact theory in their grievances against the tests, because they had experienced complete success in grievances at other steel companies by filing grievances based on a contract provision that prohibited the use of any tests that were not job-related, without any need to prove also that the tests had disparate impact.

[5] The district court made two other findings regarding the union that were mooted by the court of appeals' decision. We mention them here for the sake of completeness. First, in regard to racial harassment, the district court gave one other reason for finding the unions' reason for not making express arguments of racial discrimination to be "unacceptable": that reliance on contract provisions other than the non-discrimination clause did not satisfactorily address instances of racial harassment, which might not

The legal theory on which the district court held that the unions were liable, based upon these findings of fail-

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violate any provision of the collective bargaining agreement other than the non-discrimination clause. (138a). On the basis of this factual finding alone, the district court held that the unions had violated Title VII and Section 1981 through "[t]oleration and tacit encouragement of racial harassment." (147a). This holding was related to the district court's extensive findings pertaining to *the company* (111a-120a), in which the district court held that in the period beginning in 1967 the company had tolerated racial harassment and "passive[ly] encourage[d] the belief that individual acts of racial discrimination would go unpunished." (119a-120a, 147a).

The court of appeals vacated the findings of liability for racial harassment in light of its ruling on the statute of limitations (*see* note 2, *supra*). The court of appeals could not determine from the findings whether racial harassment had occurred frequently enough within the new limitations period to be deemed a regular occurrence or only "a few isolated incidents." (14a-15a). Presumably because of the decision to vacate those findings, the court of appeals did not address in any way the district court's finding of union liability for failure to take what the court deemed adequate action against racial harassment. (*Compare* 24a *with* 138a). (The unions pointed out to the court of appeals that within the new limitations period —the nine years from June 1971 through the trial in mid-1980 —the record disclosed only nine incidents of alleged racial harassment that came to the unions' attention. The record showed that the unions took action (including the filing of grievances) to try to prevent further harassment or to obtain relief for the victims in seven of those nine incidents.)

Second, the district court included in its findings—as an example of failure by the unions to make arguments of racial discrimination in grievances—a finding that the unions should have challenged the company's initial assignments of newly hired employees as discriminatory. Although the district court acknowledged the undisputed fact that the non-discrimination clause did not apply to initial assignments (despite persistent union efforts to obtain a clause that would apply), the court held that the unions should have filed grievances challenging initial assignments based on an interpretation of the contract that was contrary to the undisputed testimony of the union official who had negotiated the contract provision in question. (138a-139a). The court of appeals, however, vacated the findings of liability for discrimination in initial assignments on the ground that there had never been a proper class representative on this issue. (15a-24a).

ure to include racial discrimination as an explicit ground for grievances, was succinctly stated as follows:

> [*M*]*ere union passivity* in the face of employer discrimination renders the unions liable under Title VII and, if racial animus is properly inferrable, under § 1981 as well.

(139a, emphasis added). The district court equated intentional "passivity" with the kind of intent that it recognized to be a necessary premise for liability under Section 1981. The court said:

> [T]he evidence in this case proves far more than mere passivity on the part of the unions. The distinction to be observed is between a union which, through lethargy or inefficiency simply fails to perceive problems or is inattentive to their possible solution (in which case, at least arguably, the union's inaction has no connection with race) *and a union which, aware of racial discrimination against some of its members, fails to protect their interests.*

(139a-140a, emphasis added). The court went on to hold that if a union "intentionally avoids asserting discrimination claims," it is liable under both Title VII and Section 1981 "regardless of whether, as a subjective matter, its leaders were favorably disposed toward minorities." (139a-140a).

The court of appeals affirmed on the same legal theory. It accepted the "premise that there is an affirmative duty on the part of the unions to combat discrimination in the workplace." (25a). The court also concluded that the unions had a particular duty to assert claims of race discrimination in grievances. (26a). It said:

> The case against the unions here is stronger than one of mere acquiescence. The district court found that the unions *intentionally avoided asserting claims of discrimination.* In so doing, the unions violated the duty of fair representation owed to their members. . . . By shirking their responsibility for presenting grievances based on discrimination, the un-

> ions also violated the duty to enforce the collective bargaining agreement.

(*Id.*, emphasis added). Then, like the district court, the court of appeals equated *intentional discrimination* with an *intentional decision* not to allege discrimination in grievances against the company. The court stated:

> The deliberate choice not to process grievances [alleging discrimination] also violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation. The district court's finding of intentional discrimination properly supports the claims under § 1981 as well.

(26a-27a). Accordingly, the court of appeals affirmed the district court's findings of union liability. (27a).[6]

REASONS FOR GRANTING THE PETITION

The unions in this case, like many other responsible labor unions, have voluntarily undertaken a wide range of efforts to prevent employer discrimination. Nonetheless, the decision below holds the unions liable to share in the consequences of the employer's wrongs because, in the court's view, the unions did not do enough to prevent or remedy those wrongs. This holding is grounded on a theory that labor unions have a legal duty, imposed by statute, to make affirmative efforts to prevent an independent entity over which the union has no control—an employer—from violating the law.

This decision is not based on any statutory provision that outlines such a duty. On the contrary, the court below purported to base its decision on section 703(c) of Title VII, which goes no further than directing unions

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[6] The consequence of this affirmance is not only the injunction that is the subject of this appeal. In addition, "Stage II" proceedings are currently pending in the district court to determine the monetary relief to be awarded to the class. Respondents have asserted that the class is entitled to several million dollars in backpay and damages.

not "to discriminate" and not "to cause or attempt to cause an employer to discriminate . . . ." The court below also purported to base this duty on 42 U.S.C. § 1981, which this Court has authoritatively construed to prohibit only intentional discrimination, and not to impose an affirmative obligation to protect employees from another party's discrimination. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 396-97 (1982).

The decision below merits plenary consideration by this Court for several reasons.

First, the primary issue presented by the decision below is a recurring problem that has produced decisions in almost every circuit—decisions, indeed, that are in conflict. The majority of the courts of appeals, like the court below, have announced that Title VII imposes an affirmative duty on unions to make efforts to prevent employer discrimination. They have done so, for the most part, without any apparent effort to reconcile their holdings with the contrary language of the statute. At least one court of appeals has adopted the opposite view, holding that a union's mere failure to protect employees from employer discrimination is not a basis for liability.

This Court has not previously offered any guidance on this issue, but the issue has enormous practical significance for unions. Even unions, like the ones in this case, that have voluntarily undertaken efforts to prevent employer discrimination find it difficult to conform their conduct to the duties imposed on them by these courts. No matter what efforts they undertake, if they fall short of complete success, the unions risk a judicial decision that they should have done more or should have tried a different tactic. One result of such a decision is that unions can be subject to staggering litigation costs and monetary liability for the consequences of the *employer's* wrong.

Of even greater consequence, the decision below seriously impinges on the national labor policy. Congress has

followed two different patterns in legislating with respect to employment rights. One pattern—the National Labor Relations Act—establishes a framework for the *process* of collective bargaining, a framework that leaves employers and unions to arrive at their own substantive agreements, without any governmental compulsion over the terms of those agreements. The other pattern—exemplified by Title VII and other employee-protective legislation—sets minimum standards for employment that are not dependent on a union's success in collective bargaining. Statutes in the latter category give employees individual rights which they can enforce on their own, or through government agencies. The decision below—and the decisions of the other courts that subscribe to the same theory—makes unions responsible for enforcing these independent statutory rights and in so doing interferes with the national labor policy of free collective bargaining.

To avoid liability under the decision below, unions must attach the highest priority to preventing or remedying employer discrimination. Yet the entire theory of the national policy for collective bargaining is that federal law does not dictate substantive bargaining priorities or results, but allows the parties to set their own bargaining agendas and reach their own agreements. Moreover, the decision below tells unions that in representing their members they must explicitly allege race discrimination in grievances, even if their judgment in good faith is that another strategy will produce a better result. The national labor policy is to the contrary; this Court has long held that proper functioning of the collective bargaining system requires that unions be given a wide range of discretion in representing their members, "subject always to complete good faith and honesty of purpose in the exercise of [that] discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

Finally, to the extent that the decision below is based on Section 1981, it also conflicts with this Court's decision

in *General Building Contractors, supra.* Section 1981 does not create an affirmative duty to oppose someone else's discrimination. A failure to oppose such discrimination does not violate Section 1981 merely because the failure to act was the result of a deliberate decision.

Thus, the issues presented by this case are recurring ones that implicate matters of great importance to the proper functioning of the national system of labor relations. There is a conflict among the circuits as to how those issues should be resolved. Plenary consideration by this Court is fully warranted.

I. THE ISSUE UNDER TITLE VII

A. There is no doubt that, under Title VII, a union that engages in discriminatory conduct commits an unlawful employment practice. Such union liability is explicit in the statute, in Sections 703(c)(1) and (c)(2), which parallel the language of Sections 703(a)(1) and (a)(2), the sections which define unlawful practices by employers. Nor is there any doubt that a union is liable when it induces an employer to discriminate, or even attempts to do so. That ground for liability is also explicit in the statute, in Section 703(c)(3). The disputed question is whether a union can be held to violate Title VII simply because it fails to make affirmative efforts to keep an employer from discriminating.

The terms of the statute are quite explicit. When the issue is not a union's own discrimination but instead is the union's responsibility in relation to employer practices, the statutory standard is that the union may not "cause or attempt to cause an employer to discriminate." [7]

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[7] Section 703(c)(3). This language was taken *in haec verba* from Section 8(b)(2) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(2). The latter section has never been understood to impose an obligation on unions affirmatively to prevent employers from discriminating within the meaning of the NLRA. *See, e.g., Glasser v. NLRB,* 395 F.2d 401, 406 (2d Cir. 1968); *NLRB v. Jarka Corp.,* 198 F.2d 618, 621 (3d Cir. 1952).

Despite this clear language, however, a majority of the courts of appeals in one context or another have announced that unions have a duty to take affirmative steps to *prevent* employer discrimination. The seminal case on this issue was Judge Skelly Wright's opinion for the D.C. Circuit in *Macklin v. Spector Motor Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 478 F.2d 979, 989 (1973). One court of appeals recently went so far as to hold that a union is liable if it fails to make "every reasonable effort" to ensure that the employer complied with Title VII. *Howard v. International Molders Union*, 779 F.2d 1546, 1552 (11th Cir. 1986), *petition for cert. filed*, No. 85-1629 (Apr. 4, 1986).[8] This Court has never given the

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[8] In addition, see *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 314 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 282 (N.D. Ind. 1977); *Dickerson v. U.S. Steel Corp.*, 439 F. Supp. 55, 62-63 (E.D. Pa. 1977); *Hairston v. McLean Trucking Co.*, 62 F.R.D. 642, 667, 673-75 (M.D.N.C. 1974), *vacated on other grounds*, 520 F.2d 226 (4th Cir. 1975); *United States v. Bethlehem Steel Corp.*, 312 F. Supp. 977, 988-91 (W.D.N.Y. 1970), *modified on other grounds*, 446 F.2d 652 (2d Cir. 1971).

The cases cited immediately above hold, as did the court below in this case, that unions are liable for failure to take action against an employer's discriminatory practices. At least five other Circuits have decided cases in which the facts would support union liability for direct participation in some act or practice of alleged discrimination, as for example, negotiating an unlawful contract provision, but those courts have explained their decisions based on the theory of liability for failure to make affirmative efforts to prevent discrimination. *E.g., Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1120-21 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955 (1982); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1304 (9th Cir. 1982); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1379 (5th Cir. 1974); *Romero v. Union Pacific R.R.*, 615 F.2d 1303, 1310-11 (10th Cir. 1980). In the decision below, the Third Circuit relied on several of these cases as support for imposing liability on unions that had not agreed to any unlawful contract provision or joined in any un-

lower courts any guidance on the issue,[9] and most of the

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lawful act but had merely failed to oppose the employer's discriminatory acts. (25a-26a).

[9] The only employment-discrimination case in this Court which even remotely touches on the question presented herein is *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976). In *McDonald*, the primary issue was whether discrimination by an employer against white employees in meting out discipline violates Title VII. There was a secondary issue of union liability in *McDonald* based on allegations in the complaint that the union had "acquiesced and/or joined in" the company's alleged racial discrimination by negotiating a lighter penalty for a black employee than for white employees charged with the same misconduct. *Id.* at 284. The lower courts dismissed the complaint as to all defendants, holding that employees who admit having committed a crime against their employer cannot invoke the protection of Title VII. *Id.* at 278. This Court reversed and reinstated the complaint. *Id.* at 283. On the issue of union liability, the Court explained its holding as follows:

> The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them.

Id. at 285.

As the quoted sentence demonstrates, the Court understood the complaint in *McDonald* to allege that the union had "take[n] [race] into account" in negotiating a compromise that favored a black employee over the whites. Such an action would constitute intentional discrimination by the union, not failure to oppose employer discrimination. Nonetheless, the court below construed *McDonald* to support the theory that unions are liable simply because they fail to make affirmative efforts to stop an employer from discriminating. (26a). *See also Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1104 (6th Cir. 1981).

The only other decision of this Court that has any bearing on the Title VII questions presented here is *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975). In that case the court of appeals had held that unions have a duty to remedy employer discrimination "to the *fullest extent possible, by the most expedient and efficacious means*," *id.* at 59-60 (emphasis in original), and that a failure to fulfill this responsibility gave individual minor-

courts that have adopted the theory of the court below have done so without any apparent effort to reconcile their holdings with the language of Title VII.

A series of cases in the Seventh Circuit, however, has adopted a view contrary to that of the court below. First, in *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974), the plaintiffs sued the employer for maintaining a sexually discriminatory policy in regard to overtime. They sued the union as well, alleging a breach of the duty of fair representation, because the union "failed to protect the female members of the Company from said discriminatory policies and practices." 492 F.2d at 405. The court of appeals affirmed dismissal of the complaint against the unions, declaring: "*Mere failure by the Unions to protect female employees from discriminatory Corporation policies . . . is insufficient to establish liability.*" *Id.* (emphasis added).[10]

In a subsequent Title VII case, the Seventh Circuit again held that mere failure to oppose employer discrimination is not a basis for union liability. In *Babrocky v. Jewel Food Co.*, 773 F.2d 857 (7th Cir. 1985), a group of women brought suit under Title VII, alleging that their employer maintained sex-segregated job classifications and discriminated against women in wages, train-

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ity employees the right to take concerted action against the employer without any restraint from the union's status as exclusive representative. *Id.* at 60. This Court reversed, holding that the policy of eliminating discrimination "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA." *Id.* at 69.

[10] A number of district courts have reached the same conclusion in Title VII and Section 1981 actions. *E.g., Ivey v. Western Electric Co.*, 23 F.E.P. 1012 (N.D. Ga. 1977); *Mills v. Fox*, 421 F. Supp. 519 (E.D.N.Y. 1976); *Ruckel v. Essex International, Inc*, 14 F.E.P. 403 (N.D. Ind. 1976); *Meadows v. Ford Motor Co.*, 6 F.E.P. 795 (W.D. Ky. 1973); *Rosenfeld v. Southern Pacific Co.*, 293 F. Supp. 1219 (C.D. Cal. 1968). *See also Golden v. International Ass'n of Firefighters Local 55*, 633 F.2d 817, 820-21 (9th Cir. 1980).

ing, promotions, and other practices. They also sued their union under Title VII, alleging, among other things, that it had "discriminatorily failed to represent [them] by allowing Jewel to maintain its discriminatory policies." *Id.* at 860. The court of appeals held that the plaintiffs could not prevail on the claim of union failure to represent unless they proved that in allowing the employer's violation to go unrepaired, the union was "motivated by discriminatory animus." Id. at 868.[11] *See also Bugg v. Allied Industrial Workers Local 507*, 674 F.2d 595, 597-98 & n.5 (7th Cir. 1982), *appeal dismissed*, 459 U.S. 805 (1982).

The decision below cannot be reconciled with these Seventh Circuit decisions. The rule of the Seventh Circuit is that mere failure to protect employees from employer discrimination cannot be the basis for union liability unless the union acted out of a racially discrimina-

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[11] The Seventh Circuit's initial formulation of this rule is cast in terms of what a plaintiff must establish for a *prima facie* case; it is phrased as "some indication that the Union's actions were motivated by discriminatory animus." 773 F.2d at 868. Later references to what the plaintiffs would have to prove on remand make clear that the ultimate burden imposed on the plaintiffs is to prove discriminatory motivation. For example, the court observed that "the union is fairly implicated in the plaintiffs' Title VII claims if the plaintiffs can prove that the Union's failure . . . to protest the laying off of only women employees was discriminatorily motivated," *id.* at 869. The court added that the union would escape liability if such motivation were not proved. *Id.*

Neither of the Seventh Circuit's decisions, in *Williams* or *Babrocky*, precludes holding a union liable for anything it does based on a racially discriminatory motive, including a decision not to oppose some employer act or practice. Thus, if a union regularly opposes the employer's deviations from its seniority agreement but, because of racial animus, decides not to oppose the employer's decision to pass over a senior black employee and promote a white employee instead, there is no doubt that the union has violated Title VII. But it has done so because it made a discriminatory decision, not because of a mere failure to oppose the employer's discrimination.

tory motive. The Third Circuit holds that such a failure can be the basis of liability: "there is an affirmative duty on the part of the unions to combat discrimination in the workplace," and liability attaches even if the union had no racially discriminatory motive—indeed, " 'regardless of' its leadership's favorable disposition toward blacks." (25a).[12]

B. The Title VII issue presented by the decision below is also a very important one. That decision specifically dictates what labor unions must do in their dealing with employers, and it does so in a way that is fundamentally at odds with the national labor policy.

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[12] The Second Circuit may also reject the theory of union liability for merely failing to oppose an employer's discrimination. In *Philbrook v. Ansonia Bd. of Ed.*, 757 F.2d 476, 487 (2d Cir. 1985), a case in which plaintiff alleged failure to accommodate his religious observances, the court declared:

> Title VII places a duty on unions not "to cause or attempt to cause an employer to discriminate against an individual." 42 U.S.C. § 2000e-2(c)(3). We have stated previously that a union's liability depends on its "responsibility for the discrimination." *EEOC v. Enterprise Association Steamfitters Local No. 638*, 542 F.2d 579, 586 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977).

The proper standard for union liability, the court held, was that:

> the union may be held liable if it purposefully acts or refuses to act in a manner which prevents or obstructs a reasonable accommodation by the employer so as to cause the employer to discriminate.

Id. at 487, *quoting from Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 42 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 63 (1977).

The *Philbrook* case is presently pending before this Court, on writ of certiorari granted on the school board's petition. *Ansonia Bd. of Ed. v. Philbrook*, —— U.S. ——, 106 S. Ct. 848 (1986). That petition does not present any issue regarding the union's liability, as part from the basic question whether the plaintiff's religious observances had been reasonably accommodated.

Congress has followed two different patterns in legislating about employment conditions. In the National Labor Relations Act, it enacted a structure and a procedure for bargaining, leaving employers and unions to negotiate the substantive terms and conditions of employment that meet their particular needs. Under this statute, employees are directly dependent on unions to obtain contract provisions that set their wages, seniority rights, and most other terms of employment. Employees decide collectively, through their union, what protection they want, and the protection that the union can secure in bargaining is directly dependent on the collective economic strength of the employees compared to the economic strength of the employer. In a number of areas, however, Congress has concluded that it is necessary or appropriate for employees to enjoy particular protections regardless of their collective economic strength or their bargaining decisions or priorities. In those areas, Congress has enacted statutes directly establishing the necessary affirmative protections—statutes like the FLSA,[13] OSHA,[14] ERISA,[15] and Title VII. These statutes create "federal minimal employment standards" which are " 'independent of the collective bargaining process' " and that " 'devolve on [employees] as individual workers, not as members of a collective organization.' " *Metropolitan Life Insurance Co. v. Massachusetts*, —— U.S. ——, 106 S.Ct. 2380, 2397 (1985).

Where employment rights exist only by virtue of collective bargaining, employees are dependent on their unions to enforce those rights. Because unions have the exclusive right to enforce such contractual rights, this Court has held that unions are subject to the duty of fair rep-

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[13] The Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*

[14] The Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.*

[15] The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*

resentation, which obligates them to act fairly in exercising their enforcement responsibility. Where Congress has created independent statutory rights, however, it has not given unions the responsibility of enforcing those rights but instead has established governmental authorities or private causes of action (often with fee awards to prevailing plaintiffs) to do the enforcement job. The decision of the court below, and the decisions of the other courts that share its view, confuse these two patterns. These decisions make unions responsible for the enforcement of statutory rights—rights which individual employees are entitled to enforce on their own.[16] In so doing, these decisions substantially interfere with the collective bargaining process, as Congress intended it to function under the national labor policy.

The collective bargaining process established by the National Labor Relations Act is grounded on the fundamental fact that employers and unions are separate and autonomous entities—entities which "proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest." *General Building Contractors Ass'n v. Pennsylvania, supra*, 458 U.S. at 394. In the absence of a collective bargaining agreement, under our labor system "[m]anagement hires and fires, pays and promotes, supervises and plans. All these are part of its function . . . ." *Steelworkers v. Warrior & Gulf Co.*, 363

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[16] Because these rights "devolve on employees as individual workers and not as members of a collective organization," it is not part of a union's duty of fair representation to enforce these statutory rights. "[The] duty of fair representation . . . is coextensive with [the union's] statutory authority to act as the exclusive representative for all the employees within the unit." *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 376 n.22 (1984). The duty does *not* extend to those areas in which the individual employee is entirely free to protect his own interests, including the enforcement of individual statutory rights. *E.g., Freeman v. Teamsters Local 135*, 746 F.2d 1316, 1321 (7th Cir. 1984). The contrary holding of the court below is also in conflict with this decision of the Seventh Circuit.

U.S. 574, 583 (1960). A union cannot control management; it can affect management's conduct in running the business only to the extent that it can secure collective bargaining agreements that limit these managerial powers. A union cannot prevent employer discrimination that violates Title VII unless it negotiates for contract provisions that would prohibit management from engaging in practices that violate that law. And, if it succeeds in obtaining any such contract provisions, it must then expend its resources in the grievance/arbitration procedure to enforce those provisions.

A union duty to take affirmative action to prevent employer discrimination thus dictates the substantive positions that the union must take in bargaining and in contract administration. This is contrary to the national labor policy. "The goal of federal labor policy . . . is . . . to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959). That goal is "served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves." *Id.* The parties determine their own bargaining agendas and their own priorities and make their own compromises and agreements. "[G]overnment may not step in and become a party to the negotiations," *Golden State Transit Co. v. Los Angeles*, —— U.S. ——, 106 S. Ct. 1395, 1401 (1986), because Congress "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences," *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960). Indeed, "the fundamental premise on which the [National Labor Relations] Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

The same principle applies to the union's activities in enforcing contract provisions. The union's duty of fair representation is built on the premise that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents," *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), because "union discretion is essential to the proper functioning of the collective-bargaining system," *Electrical Workers v. Foust*, 442 U.S. 42, 51 (1979). The duty recognizes that it is the union's function to "balanc[e] individual and collective interests" so as to develop proposals and strategies that produce "increased benefits for workers in the bargaining unit as a whole." *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 742 (1981). Thus, so long as a union arrives at its decisions on grievances "honestly, in good faith, and without hostility or arbitrary discrimination," the duty of fair representation is not offended regardless of the *substance* of the union's positions. As long as it avoids such prohibited motivations, the union can take a position that is "contrary to that of some individuals whom it represents" or that "support[s] the position of one group of employees against that of another." *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964).

The theory of the decision below and of the other courts that have reached a similar conclusion conflicts with this national labor policy on two levels. First, it injects governmental compulsion into the substantive result to be reached through bargaining, by imposing on each union an affirmative duty to obtain anti-discrimination contractual provisions. Because such "contractual rights and remedies against discrimination"—like any other contractual right that a union secures—"must result from other concessions already made by the union as part of the economic bargain struck with the employer," *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974), the duty the court below has read into Title VII effectively fixes bargaining priorities for unions. Under the decision below

unions are compelled to subordinate other bargaining aims to the goal of securing contractual provisions that duplicate the protections already conferred by Title VII. This is true regardless of the other pressing problems that the represented group of employees may face—problems as to which there may be no direct statutory protection and as to which the employees are wholly dependent upon whatever contractual rights they can obtain by dint of their collective strength. Furthermore, the duty created by the court below exists regardless of the union's bargaining strength or lack thereof.

Imposing such a duty on a union and holding the union liable for an employer's wrongs unless a court finds that the union advanced all of the demands it was required to advance, pressed those demands with sufficient vigor, and made only reasonable compromises, can only destabilize collective-bargaining relationships and interfere with the parties' ability to reach agreements reflecting their needs and desires without resort to economic warfare. Such a requirement thus will defeat the overall aim of the national labor policy: enabling employers and employees "to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Teamsters Union v. Oliver, supra,* 358 U.S. at 295.

On the second level, the decision below also conflicts with the national labor policy because when unions choose to oppose employer discrimination, the decision below refuses to allow them any discretion to decide what strategies are best calculated to achieve their goal. Unions are not allowed to decide that the best way to attack an employer's tests is through a grievance asserting they are not job-related; the decision below holds the unions liable for not arguing that the tests have a disparate impact. Unions are not allowed to decide that a grievance based on seniority is the best way to remedy a discriminatory action by management; the decision below holds the unions

liable for failing to allege that management had a discriminatory *motive* for breaching the seniority agreement. These holdings flatly deny the "union discretion [that] is essential to the proper functioning of the collective-bargaining system." *Electrical Workers v. Foust*, *supra*, 442 U.S. at 51. Moreover, they do so despite the district court's findings that in regard to a number of employer practices, including work assignments, overtime, and discharges of nonprobationary employees, the grievances that the unions did file—based chiefly on contract provisions other than the non-discrimination clause—were effective in remedying the discriminatory actions that the company took. (*See* page 7, *supra*).

This Court previously has held that the congressional policy of eliminating discrimination "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 69 (1975). *See also TWA v. Hardison*, 432 U.S. 63, 79 (1977). The category of cases in which a union has merely failed to make affirmative efforts to prevent employer discrimination would seem to be the last cases in which the national labor policy should be deemed to have been compromised by the enactment of Title VII. Congress enacted Title VII for the very purpose of creating rights that would be independent of "majoritarian processes"; indeed, Title VII rights "can form no part of the collective bargaining process," because to make Title VII rights dependent upon the outcome of collective bargaining "would defeat the paramount congressional purpose behind Title VII." *Alexander v. Gardner-Denver Co.*, *supra*, 415 U.S. at 51. Title VII confers on each employee, as an individual, an indefeasible right to be free from employment discrimination. And Title VII both establishes a procedure by which any employee may enforce that statutory right and also creates a public agency, the Equal Employment Opportunity Commission,

which "is empowered . . . to prevent any person from engaging in any unlawful employment practice," 42 U.S.C. § 2000e-5(a).

It is thus apparent that Congress did not commission labor unions, which are majoritarian organizations, to serve as Congress' agent in enforcing the individual rights created by Title VII. It follows that nothing in Title VII justifies impairing the national policy of free collective bargaining, which is precisely what the decision below does. To safeguard the national labor policy—and to resolve the conflict among the circuits—the Court should issue a writ of certiorari.

II. THE ISSUE UNDER SECTION 1981

To the extent that the decision below is based on Section 1981, it is also in conflict with the principles stated by this Court in *General Building Contractors Ass'n v. Pennsylvania, supra.*

In *General Building Contractors* a group of employers agreed to hire only persons referred by a union-operated hiring hall. The union, acting on its own, discriminated against blacks in its referrals. No claim was made that the employers were guilty of discrimination, but the lower courts held the employers liable for the *union's* discrimination, concluding, in effect, that the employers had "a 'duty to see that discrimination does not take place in the selection of [their] workforce,' regardless of where the discrimination originates." 458 U.S. at 392. This Court reversed.

The Court held first that Section 1981 is violated only by "purposeful discrimination," that is, by "racially motivated" actions, "blatant deprivations of civil rights, clearly fashioned with the purpose of oppressing" black persons. 458 U.S. at 388, 391. The Court also held that the statute "does [not] impose an affirmative obligation to ensure that blacks enjoy [the] right" to be free from

discrimination, nor does it make defendants "the guarantors of workers' rights as against third parties who would infringe them." *Id.* at 396. The Court concluded its reasoning by observing that any such duty would be inconsistent with the requirement of intentional discrimination. The Court explained:

> It would be anomalous to hold that § 1981 could be violated only by intentional discrimination and then to find this requirement satisfied by proof . . . that the defendants merely failed to ensure that the plaintiffs enjoyed employment opportunities equivalent to that of whites.

Id. at 396-97.

The decision below cannot be reconciled with these principles. The court below held that unions are liable under Section 1981 for failing to make affirmative efforts to stop the *employer's* discrimination. It held that this liability existed " 'regardless of' [the union] leadership's favorable disposition toward blacks." (25a). The court below did not require any finding that the unions' actions were racially motivated or that in this respect the unions treated black and white employees differently. Instead, like the district court, the court of appeals held that Section 1981's requirement of intentional *discrimination* was satisfied by a finding that the unions made intentional *decisions* not to assert arguments of racial discrimination in grievances or other complaints. (26a). But an intentional *decision* not to make affirmative efforts to stop another's discrimination does not, and cannot, substitute for what this Court required in *General Building Contractors*: it does not constitute either "purposeful discrimination" or "racially motivated" action. Where there is no duty to act, a deliberate decision not to act is not a statutory violation.[17]

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[17] Although the court of appeals used the phrase "finding of intentional discrimination" to refer to the district court's findings on Section 1981, it did so immediately after stating that a "deliber-

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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ate choice" not to assert claims of discrimination was itself discrimination. ("The deliberate choice not to process grievances also violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation.") (26a). Moreover, if there had been any finding that the unions acted out of racial motivation in deciding not to assert claims of discrimination "as such," or any finding that in doing so the unions had treated black and white employees differently, the court would have had no reason to engage in its lengthy discussion of liability for failing to make affirmative efforts against employer discrimination. A finding of racially motivated failure to represent, or of union difference in treatment based on race, would have supported a judgment of liability based on the well-established construction of both Title VII and Section 1981. There was no such finding in this case.

85-2010

No. ———

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, LOCAL UNION 1165; and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, LOCAL UNION 2295,

Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, DOCK MEEKS, DAVID DANTZLER, JR., and JOHN R. HICKS III, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, and UNITED POLITICAL ACTION COMMITTEE,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 84-1478 & 84-1509

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., and LYMAS L. WINFIELD, on their own behalf and on behalf of others similarly situated,

and

UNITED POLITICAL ACTION COMMITTEE, an unincorporated association, DOCK MEEKS, DAVID DANTZLER, JOHN HICKS, III, individually and on behalf of all others similarly situated

v.

LUKENS STEEL COMPANY, and INTERNATIONAL STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO)

United Steelworkers of America, AFL-CIO-CLC, and its Local Unions 1165 and 2295, Appellants in 84-1478

Lukens Steel Company, Appellant in 84-1509

Appeal from the United States District Court for the Eastern District of Pennsylvania

(D.C. Civ. No. 73-1328)

Argued June 11, 1985

Before: WEIS, GARTH, and STAPLETON,
Circuit Judges

Filed November 13, 1985,
as amended November 22, 1985

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OPINION OF THE COURT

WEIS, *Circuit Judge.*

This appeal is from the grant of injunctive relief and liability findings in a wide-ranging employment discrimination class action. We conclude that: (1) the same period of limitations applies in § 1981 claims as in those under § 1983; (2) class representatives who were not discriminated against in initial work assignments may not represent those who were; (3) on remand, consideration should be given to appointment of an appropriate representative and possible reinstatement of findings; (4) the unions violated Title VII and § 1981 by failing to assert racial bias as grievances; (5) the limitations period for a Title VII charge against a union begins only after it is named in an EEOC proceeding and not on the date that a charge is brought against the employer alone in a state proceeding; (6) a finding of discrimination in denying incentive pay was clearly erroneous where the evidence demonstrates the action was taken solely on economic grounds; and (7) other findings of discrimination by the district court were not clearly erroneous. Accordingly, we affirm, reverse, and remand in part.

After a lengthy bench trial, the district judge found for plaintiffs on several counts alleging discrimination

in employment, and therefore entered a remedial order, reserving assessment of damages for future proceedings. On the other counts, the court concluded that the evidence was inadequate to support the plaintiffs' claims and entered judgment for defendants. Defendants appeal the orders adverse to them.[1]

In 1973, class action plaintiffs filed this massive suit on behalf of current and past employees of the Lukens Steel Company, alleging violations of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Plaintiffs sought both injunctive relief and damages.

Defendant Lukens is an independent steel producing company with its principal facility in Coatesville, Pennsylvania. Since 1966, its work force has ranged between approximately 4200 and 5300 employees; of these the hourly employees numbered between 2600 and 3900. From 1967 to 1978, the percentage of black employees in the hourly work force varied between 21.8 and 24.1. Lukens' hourly employees had been represented by Locals 1165 and 2295 of the United Steelworkers of America, and the unions are listed as defendants together with the company.

The district court observed that work at Lukens requires skills which are unique to its specialized products. With a few limited exceptions, the "majority of the Lukens hourly work force start from scratch, and are trained on the job." Partially as a consequence of the need for highly specific skills, the company has a general policy of promoting from within its workforce. The district court found that to some extent current disparaties between white and black employees are a reflection of historical discrimination existing well before the statutory limitations period applicable in this lawsuit.

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[1] The district court opinion is reported at Goodman v. Lukens Steel Co., 580 F. Supp. 1114 (E.D. Pa. 1984).

Plaintiffs developed their case by a combination of statistical and anecdotal evidence. After the compilation of an extensive record, the court found evidence of discriminatory practices by the company in the following categories:

1. Initial job assignments to higher paying craft jobs were skewed in favor of whites. Blacks also were assigned in higher percentages than whites to "pool" positions, which had seniority provisions inferior to those in the "subdivisions."
2. Evidence focusing on transfers to more desirable craft positions demonstrated that whites were favored over blacks by a substantial margin.
3. Incentive pay was denied to workers in the predominantly black crews in the Pit Subdivision, although it was given to other specialized crews composed mainly of whites.
4. Lukens discriminated against black workers by discharging a higher percentage of black employees during their probationary period.
5. The company discriminated against blacks in denying them promotion to salaried positions in management.
6. Lukens tolerated harassment of black employees by whites and failed to take appropriate steps to curb such behavior, thereby encouraging workers to believe such conduct would go unpunished.

The district court also determined that the unions were guilty of discriminatory practices in:

1. Failing to challenge discriminatory discharges of probationary employees.
2. Failing and refusing to assert instances of racial discrimination as grievances.

3. Tolerating and tacitly encouraging racial harassment.

The court further found that plaintiffs had failed to present adequate proof of discrimination in the following areas:

1. The seniority system.
2. Manning of the new Strand-cast facility (with the exception of class representative Ramon L. Middleton).
3. Shift assignments, including Sundays and holiday work, as well as overtime pay.
4. Discipline (excluding discrimination in discharge of probationary employees).
5. Awards for employee suggestions for improvement in plant operation.
6. Processing grievances by the unions insofar as the complaints centered on the number of grievances which the locals presented initially and pursued through arbitration. In addition, the lower rate of successful outcomes for black employees' grievances did not show racial discrimination.

The court also directed individual relief for class representatives Goodman, Winfield, Jones, Middleton, and Dantzler, but denied the individual claims of Dock L. Meeks, and John R. Hicks III.

The court issued orders against the company and the unions enjoining racial discrimination in the specific areas in which violations of Title VII and § 1981 had been found and directing certain remedial measures. Notice to class members was ordered, and a tentative trial date was set for the individual claims.

Both the company and the unions have appealed the various findings against them, challenging both legal and

factual determinations made by the district court. Plaintiffs have not appealed the rulings on which they or the class were unsuccessful.

I.

THE STATUTE OF LIMITATIONS FOR SECTION 1981 CLAIMS

Because there is no specified federal statute of limitations applicable to § 1981 cases, the district court was required to use the state limitations period most analogous to the civil rights cause of action. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). In a Memorandum Opinion issued on June 16, 1975, the district court concluded that the appropriate period was the six years set forth in Pa. Stat. Ann. tit. 12, § 31, rather than the two year period "for injury wrongfully done to the person" as set out in Pa. Stat. Ann. tit. 12, § 34.

In this determination, the district judge anticipated our decision some two years later in *Meyers v. Pennypack Woods Home Ownership Ass'n.*, 559 F.2d 894 (3d Cir. 1977), where we applied the six year general statute of limitations in a housing discrimination case brought under sections 1981 and 1982. *See also Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978) (six year statute of limitations applicable to § 1981 employment discrimination claim).

Although the district judge was correct in forecasting that we would adopt a six year limitation period in an employment case, his prescience, like ours, was limited. Neither he, nor this court, foresaw the Supreme Court's ruling that all § 1983 cases should be governed by a uniform statute of limitations—that provided by the states for personal injury. *Wilson v. Garcia*, 53 U.S.L.W. 4481 (Apr. 17, 1985). That ruling requires us to reexamine our earlier decisions on the appropriate statute of limitations in Civil Rights cases.

In *Polite v. Diehl*, 507 F.2d 119 (3d Cir. 1974) (*in banc*), we discarded the notion of applying a single limitations period to all § 1983 cases and chose instead to look to the relief sought and the particular injury alleged. A claim alleging bodily injury was governed by the two year Pennsylvania statute but one which was more akin to a contract action came under the six year limitation. Hence, under *Polite v. Diehl* differing statutes of limitations would be applied to a variety of claims in one suit.

Although the court discussed only the § 1983 claims, it noted that plaintiff did formulate causes of action under § 1981. 507 F.2d at 121, n.2. In any event, the *Polite* rationale of looking to the facts in each case and then searching out for the most analogous state statute was followed in § 1981 cases, as well as those brought under § 1983. *See Davis v. United States Steel*, 581 F.2d at 338, 341 n.8; *Meyers v. Pennypack Words Home Ownership Ass'n.*, 559 F.2d at 903 n.27.

We later determined that the six year statute of limitations applied in § 1983 claims of (1) sex discrimination in employment, *Knoll v. Springfield Township School Dist.*, 699 F.2d 137 (3d Cir. 1983), *vacated and remanded* 53 U.S.L.W. 4488 (Apr. 17, 1985), *on remand* 763 F.2d 584 (3d Cir. 1985); (2) termination of employment without due process, *Perri v. Aytch*, 724 F.2d 362 (3d Cir. 1983); (3) discharge from employment in violation of the First Amendment, *Fitzgerald v. Larson*, 741 F.2d 32 (3d Cir. 1984); and (4) termination of employment contract for exercise of First Amendment rights, *Skehan v. Trustees of Bloomsburg State College*, 590 F.2d 470 (3d Cir. 1978).

Wilson v. Garcia completely undermined the rationale we employed in *Polite* as we were quick to recognize. *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985), reviewed our earlier decisions in light of *Wilson* and ap-

plied Pennsylvania's two year statute of limitations for personal injuries to a § 1983 claim of employment termination without due process. In view of the previous unsettled law in this and other circuits, in *Smith* we also determined that *Wilson v. Garcia* should be applied retroactively.

Had the case at hand been brought under § 1983 rather than § 1981, the statute of limitations question would be answered by *Wilson*. This case, however, involves discrimination in private employment to which § 1983 does not apply, and therefore the issue is whether the same statute of limitations used under § 1983 should also apply to § 1981.

The *Wilson v. Garcia* analysis begins with a reference to 42 U.S.C. § 1988, which determines the "rules of decision applicable to Civil Rights claims." Because no federal statute of limitations has been provided for such claims, § 1988 approves the use of state law to provide the appropriate rule. The reference to state law, however, occurs only after analysis of the claim using federal standards. I[n] characterizing § 1983 claims for statute of limitations purposes, the court must consider the elements of the cause of action and Congress' purpose in providing it. *Wilson*, 53 U.S.L.W. at 4483.

In deciding the issue presented here, we find it most significant that § 1988 applies not only to § 1983 but to § 1981 and the other reconstruction Civil Rights Acts as well. Section 1988 by its terms applies to "the jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'Civil Rights,' and of Title 'Crimes,' for the protection of all persons in the United States in their civil rights."

In this context, we do not consider relevant that § 1981 was originally enacted in 1866, reenacted in 1870, and later included in the 1874 codification, while § 1983 was the subject of separate legislation in 1871. *See Runyon v.*

McCrary, 427 U.S. 160, 168 n.8 (1976); *Mahone v. Waddle*, 564 F.2d 1018, 1030-31 (3d Cir. 1977). Both sections are to be analyzed under the broad provision of § 1988, which is "a directive to select, in each state, the one most appropriate statute of limitations." *Wilson*, 53 U.S.L.W. at 4485. In this choice, we should be guided by "federal interests in uniformity, certainty, and the minimization of unnecessary litigation" over the limitations period as well as by the nature of the federal Civil Rights remedy, and the prevention of potential state discrimination against it.

In concluding that state statutes for personal injury were the most appropriate for use in § 1983 cases, the Supreme Court believed that the enacting Congress viewed civil rights actions as analogous to state tort claims. In this connection, one might argue, as does the dissent, that since § 1981 on "its face relates primarily to racial discrimination in the making and enforcement of contracts," *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975), the state statute of limitations applying to suits for breach of contract is the most appropriate one. *See Wilson v. Sharon Steel Corp.*, 549 F.2d 276, 280 (3d Cir. 1977).

We are not persuaded by that argument because it does not recognize the broad sweep of § 1981, *see Mahone v. Waddle*, nor is it consistent with the fundamental reasons underlying *Wilson v. Garcia*. There, the Court emphasized § 1983's derivation from the Fourteenth Amendment, which recognizes the "equal status of every person;" that all persons shall be accorded the full privileges of citizenship; and that no person should be deprived of life, liberty or property "without due process." *Wilson*, 53 U.S.L.W. at 4485. As the Court said, "[a] violation of that command is an injury to the individual rights of the person." *Id.*

Those concepts apply equally to actions under § 1981. Present day § 1981's predecessor was founded on the

Thirteenth Amendment that allows "neither slavery nor involuntary servitude" to exist any longer. It is difficult to imagine a more fundamental injury to the individual rights of the person than the evil that comes within the scope of that amendment. Also of significance is that in *Runyon v. McCrary*, the Supreme Court accepted the use of a state's personal injury statute of limitations in a § 1981 case. 427 U.S. at 180-82.

Moreover, in its reenactment of § 1981 in 1870, Congress looked to constitutional authority embodied in the Fourteenth, as well as in the Thirteenth Amendment. *Croker v. Boeing Company*, 662 F.2d 975, 987 (3d Cir. 1981) (*in banc*); *see also General Building Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375 (1982). Consequently, much of the body of law developed under the Fourteenth Amendment is helpful in the interpretation of § 1981.

A substantial overlap exists in the types of claims brought under sections 1981 and 1983. A plaintiff may press an allegation of intentional racial discrimination under either section when state action is present. A § 1983 case of intentional racial discrimination in employment filed in Pennsylvania against a state agency is governed by the two year personal injury statute. *See Knoll v. Springfield Township School Dist.*, 763 F.2d 584 (3d Cir. 1985). Application of Pennsylvania's six year statute of limitations where the same claim is brought under § 1981 would lead to a bizarre result.

Our first opinion in *Knoll*, 699 F.2d 137, 144, expressed our doubt that Congress would have intended a differing limitations period depending on whether the defendant was a state official sued under § 1983 or a private individual in a § 1981 action. The same conclusion is appropriated where the identical claim may be brought under either of these Reconstruction Civil Rights Acts. *See Jackson v. City of Bloomfield*, 731 F.2d 652 (10th

Cir. 1984). Therefore, because employment discrimination cases under § 1983, regardless of their affinity to contractual actions, are now governed by the personal injury statute of limitations, and because the same considerations which led to that judgment are also present in § 1981 cases, we conclude that the same limitations period applies.[2]

In taking this position, we are in agreement with Supreme Court in *Wilson* that the personal injury limitation period is unlikely to be fixed in such a way as to discriminate against federal Civil Rights claims. In addition, the factors characterized as "practical considerations" by Justice O'Connor's dissent in *Wilson*—which include the desirability of uniformity, certainty, and minimization of litigation prior to reaching the merits—are best served by applying the same statute of limitations to all of the Reconstruction Civil Rights cases.[3]

As we noted earlier, the reasoning employed by the Supreme Court in *Wilson* is inconsistent with the *Polite* approach as used in *Davis* and *Pennypack Woods*. This court has consistently held that one panel may not overrule an earlier panel's decision. *See* Third Circuit Internal Operating Procedure VIII C. However, we have recognized that this principle must yield when a panel

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[2] We note that in 1978 and 1982 Pennsylvania's statute of limitations scheme was substantially revised. Claims for injury to economic rights, as well as for personal injuries, are currently subject to a two year limitation. 42 Pa. Cons. Stat. Ann. § 5524.

[3] The plaintiffs argue that under the rule we adopt in this opinion a statute meant to cover only cases involving bodily injury will be applied to actions in which no such injury is alleged. *See* Meyers v. Pennypack Woods, 559 F.2d at 902. The Supreme Court clearly foresaw the possibility that uniform characterization of all civil rights claims might lead to some seemingly anomalous results under a particular state statutory scheme. *See* Wilson v. Garcia, 53 U.S.L.W. at 4484. That state law interpretations are not fully consistent is an acceptable result when considered in light of the overriding federal interest in uniformity.

opinion is in conflict with an intervening Supreme Court precedent. "Where, however, a holding of this Court is overruled or rejected by the Supreme Court, IOP 8c does not require in banc consideration to align this court's jurisprudence with Supreme Court teaching." *Rubin v. Buckman*, 727 F.2d 71, 74 (3d Cir. 1984) (Garth, J. concurring). *See also West v. Keve*, 721 F.2d 91, 93 (3d Cir. 1983); *Geraghty v. United States Parole Commission*, 719 F.2d 1199, 1209 (3d Cir. 1983). The rationale used in *Davis* cannot co-exist with *Wilson*, and accordingly does not bind us here.

We hold, therefore, that the personal injury statute of limitations of the forum state supplies the most analogous statute of limitations for actions brought under § 1981. For the reasons set forth in *Smith v. City of Pittsburgh*, we also conclude that our decision should be given the customary retroactive effect. *See Fitzgerald v. Larson*, 769 F.2d 160 (3d Cir. 1985).

Our holding affects some but not all of the findings made by the district court. Plaintiffs contend that the two year statute of limitations would not change the district court's decree because it was based on violations of Title VII as well as § 1981.[4] However, because the court did not consider the facts separately under § 1981 and Title VII, we conclude this lack of discrete analysis requires a partial remand.

As noted in *Croker v. Boeing*, 662 F.2d 975 (3d Cir. 1981), § 1981 liability is not co-extensive with that under Title VII, and the remedies provided under the two statutes are "separate, distinct, and independent." *See*

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[4] The district court determined that as to the claims against the company, the Title VII limitations period began on May 6, 1970, and that finding has not been challenged on appeal. Evidence of disparate treatment under Title VII provides the elements of intentional discrimination under § 1981. *See* Lewis v. University of Pittsburgh, 725 F.2d 910, 915 n.5 (3d Cir. 1983).

Johnson v. Railway Express Agency. In the absence of a specific finding fixing liability under each statute, we are unable to say whether application of the two year statute of limitations would result in a difference in the court's decree on two of its liability determinations. It is conceivable, for example, that events within the six year statute of limitations used for the § 1981 claims might have been considered by the court in finding liability under Title VII beyond its limitations period.

In finding discrimination in transfers to salaried positions, the district court relied heavily on the low percentage of blacks promoted to foreman jobs in the years 1969 and 1970—between three and four years before the suit was filed. The court found that the evidence "overwhelmingly establishes that Lukens discriminated in the selection of foremen until at least 1971." 580 F.Supp. at 1145. For the years 1971 through 1978, however, approximately 26% of the foreman promotions were given to blacks—not substantially different from their 29% representation in the work force during those years.

The record contains other anecdotal and statistical evidence on this point which should be evaluated by the district judge in the first instance. We are mindful that a finding of class-wide violation is supported only when the evidence shows that discrimination was the company's standard operating procedure, rather than something which occurred only in a few isolated incidents. *See International Bhd. of Teamsters v. United States,* 431 U.S. 324 (1977). In such a situation, the trial judge's appraisal is particularly important.

Similarly, the district court's finding that the company tolerated racial harassment within the work force must be reevaluated on remand. The court stated that it had considered more than 100 incidents or practices, many of which "predated the limitation period" and about 35 of which "occurred within the limitations period or shortly

before—e.g. 'in the late 1960s' or 'between 1965 and 1970'." 580 F. Supp. at 1147. The court recognized the critical inquiry as "assessing the conditions which prevailed during the limitations period." *Id.*

Some of the instances described in detail by the district judge occurred before 1971 and some thereafter. We are unable to determine from the record what effect the application of the two year statute of limitations for the § 1981 claims would have on the district court's conclusion with respect to the harassment charge. Consequently, it too will require reexamination by the trial court.

We have surveyed the findings on the other issues and conclude that they would not be affected by the two year limitations period. Naturally, in the portion of the case remaining to be tried for assessment of individual damages, the two year statute would apply.

II.

CLASS CERTIFICATION AND CLASS REPRESENTATIVES

A.

A second major issue presented in this case is that of class representation. In this area, too, subsequent decisional law requires review of the district court's ruling in a somewhat different light than that which prevailed at the time the court acted.

In a Memorandum of June 16, 1975, the district court certified a class of "all black persons employed by the defendant Lukens Steel Company at any time on or after June 14, 1967." This class includes persons whose employment was within the six year statute of limitations for § 1981 applied by the district court. To that extent, the class definition must be narrowed.

A review of the class allegations in the complaint and the court's certification order shows that the suit was conceived as a broad, "across the board" attack on racial discrimination at Lukens. As class representatives, the court approved Charles Goodman, Ramon L. Middleton, Romulus C. Jones, Jr., Lymas L. Winfield, Dock Meeks, David Dantzler, and John R. Hicks, III. Each of these plaintiffs asserted specific claims of discrimination practiced against them by the company and, in several instances, by the unions as well.

Because of the nature of the claims, the court concluded that any ruling on the appropriateness of damages was premature, and therefore certified the class under Fed. R. Civ. P. 23(b)(2). *See Kyriazi v. Western Electric Co.*, 647 F.2d 388 (3d Cir. 1981). Possible definition of a class under Rule 23(b)(3) for assessment of damages was reserved. After making its liability determinations, the court directed counsel to prepare a proposed form of notice to class members.

On appeal, defendants contend that the district court erred in allowing the individual plaintiffs who asserted injury from specific discriminatory practices to represent a broad class alleging violations beyond those of the named individuals.

Initially, we observe that contrary to the defendants' contentions, the issue here is one of compliance with the provisions of Rule 23, not one of Article III standing. Each of the named plaintiffs has presented claims of injury to himself and has alleged facts which present a case or controversy under the Constitution. *Cf. O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("If none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.").

The thrust of the defendants' challenge is that the injuries to the named plaintiffs are in many instances

not the same as those advanced on behalf of the class. In essence, defendants contend that the allegations of the named plaintiffs do not present "questions of law or fact common to the class" and that their "claims . . . are [not] typical of the claims . . . of the class" as required by Rule 23(a)(2) and (3). For this reason, we need only consider whether the named plaintiffs meet the requirements of Rule 23.

The expansive "across the board" class action attack on employment discrimination gained currency in a series of cases typified by *Johnson v. Georgia Highway Exp. Inc.*, 417 F.2d 1122 (5th Cir. 1969), and *Payne v. Travenol Lab., Inc.*, 565 F.2d 895 (5th Cir. 1978). *See also Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239 (3d Cir. 1975); *Mack v. General Elec. Co.*, 329 F. Supp. 72 (E.D. Pa. 1971); Rutherglen, *Title VII Class Actions*, 47 U. Chi. L. Rev. 688 (1980). In *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), however, the Supreme Court pulled in the reins by insisting on actual, not presumed, compliance with the typicality and commonality provisions of Rule 23.

The Supreme Court pointed out that a named plaintiff's proof of his personal claim would not necessarily establish that the discriminatory practice was pervasive or was reflected in other employment activities. As the Court said, "[i]f one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation." *Id.* at 159.

In *Falcon*, the named plaintiff alleged that he had been denied a promotion because he was a Mexican-American. The Court determined that he could not represent a class of Mexican-Americans attacking discrim-

ination in hiring. The Court cited *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), in which named plaintiffs who were not qualified as over-the-road drivers could not represent a class of qualified drivers who complained of discrimination. Because the named plaintiffs "could have suffered no injury as a result of the alleged discriminatory practices, . . . they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury." 431 U.S. at 403-04.

Scott v. University of Delaware, 601 F.2d 76 (3d Cir. 1979), presented a similar problem. There, a former faculty member whose contract was not renewed alleged that he was a victim of racial discrimination and sued under sections 1981 and 1983 as well as Title VII. He sought to represent a subclass of applicants seeking initial faculty appointments who were also allegedly victimized by racial considerations. The district court entered judgment on the merits for the defendant on both the individual and class claims.

We determined that the plaintiff could not represent a class contesting the university's hiring procedures. Clearly, he had suffered no harm from discrimination in hiring practices since he had initially obtained a position. In that situation, absent class members might be harmed by the preclusive effect of the district court's judgment. Therefore, we concluded that the court had a duty to "consider carefully the requirement of fair and adequate protection" to the absent class members, despite the lack of a cross appeal of the class certification ruling by the defendant. *Scott*, 601 F.2d at 83.[5]

As is clear from *Scott*, assessment of the adequacy of representation initially must focus on any potential conflicts of interest between the named individuals and the

[5] The defendant in *Scott* did challenge the propriety of the class certification in both the district court and on appeal.

class. On this record, we find no divergence that would impair the incentive of the named plaintiffs in vigorously prosecuting all aspects of the claims that are otherwise found to be adequately represented. *Scott v. University of Delaware*, 601 F.2d at 85. *See* Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 Va. L. Rev. 11 (1983).[6] The defendants have raised additional allegations of error in class certification, however, which must also be addressed.

The class representatives alleged a variety of instances of discrimination by the company and the unions in various employment practices, covering most of the claims presented by the class. Included were promotion (Middleton, Winfield, Jones), incentive pay (Meeks), discharge (Goodman, Hicks, Dantzler), harassment (Meeks), inadequate union representation (Middleton, Dantzler, Meeks), testing (Meeks), seniority system (Meeks), discipline (Dantzler), and manning of the new Strand-Cast facility (Middleton).

Defendants contend that in a number of areas the class representatives' specific allegations are distinct from those of the class as a whole. For example, none of the named plaintiffs were discharged during the probationary period. Nonetheless, some do allege that racial bias resulted in their discharge. Even though the alleged discrimination occurred after their probationary period had passed, we conclude that the typicality of their claims makes them adequate representatives under Rule 23.

The defendants' contentions are not completely without merit however. Even under an expansive view of representation, discrete areas of alleged bias exist in which the

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[6] The fact that some of the named plaintiffs did not prevail on their individual claims does not make them inadequate class representatives. *See* East Texas Motor Freight v. Rodriguez, 431 U.S. at 406 n.12 (1977); International Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259 (4th Cir. 1981).

record does not demonstrate the required commonality and typicality of the class complaints with those of the individual representatives. A footnote in *Falcon* suggests that "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify" a broad class if the bias manifested itself "in the same general fashion, such as through entirely subjective decisionmaking processes." 457 U.S. at 159 n.15. We do not regard the case at hand as meeting those requirements. The findings of the district court, which rejected some of the plaintiffs' claims, belie the existence of a "general policy" of discrimination and plaintiffs did not produce "significant proof" of such a scheme.

The district court found discrimination in the initial assignment of Lukens' newly-hired employees. To be actionable, the discriminatory practice must exist during the applicable limitations period. All of the named plaintiffs, however, were originally hired outside the limitations period, and therefore, none have a viable complaint about discrimination in initial assignment. Thus, no representative adequately represents the class in this particular claim. *See Hill v. AT&T Technologies, Inc.*, 731 F.2d 175 (4th Cir. 1984).[7]

Because in this instance a qualified class representatives is lacking, the findings applicable to it must be vacated. Economical use of judicial resources, however, requires that some thought be given to whether the work of district court and counsel with respect to this claim may yet be salvaged.

B.

We begin by acknowledging the realities of class suits, a sometimes neglected approach in this field. In a mas-

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[7] Nor do we find appropriate class representatives for one claim resolved in defendants' favor—that in which discrimination in the awards for suggestions made to the company was alleged. That point has not been raised by defendants or plaintiffs, and we leave it for further exploration, if desired, in the district court.

sive class action such as the one at hand, it is counsel for the class who has the laboring oar. The class representatives furnish the factual basis to invoke the jurisdiction of the court and provide the outline of the controversy, but the lawyers shape the claims for adjudication by the compliation of factual and expert testimony and the presentation of statistical and documentary evidence.

That work was performed in this case by thoroughly competent counsel as to the claims in which the court found for plaintiffs as well as those where it ruled for defendants. We do not prejudge the issue but merely note the distinct possibility that the evidence presented would not have varied one iota had a qualified representative for each claim been present from the inception of the suit. If that possibility is indeed the fact, then another suit filed on such a claim by a newly qualified class representative would produce a trial that would simply repeat the previous one. That result would yield no discernable benefit to anyone but would generate substantial loss in time for court, counsel, and parties.[8]

To obviate such unnecessary duplication, on remand the district court should explore the possibility of intervention by qualified class representatives, followed by a proceeding to determine if the findings previously reached may be reinstated. That solution was suggested by the Court of Appeals for the Fourth Circuit in *Hill v. Western Elec. Co., Inc.*, 672 F.2d 381 (4th Cir. 1982). *See* Note, *Reinstating Vacated Findings in Employment Discrimination Class Actions: Reconciling General Telephone Co. v. Falcon with Hill v. Western Electric Co.*, 1983 Duke L.J. 821.

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[8] Such a suit would be timely since the commencement of the class action tolled the statute of limitations as to members of the class. *See* Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345 (1983); Edwards v. Boeing Vertol Co., 717 F.2d 761 (3d Cir. 1983).

Intervention is still permissible even at this stage, *see United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), and a class action determination in some instances may be made even after appeal. *McLaughlin v. Wohlgemuth*, 535 F.2d 251, 252 n.2 (3d Cir. 1976).

As the *Hill* court observed, practical fairness should guide the district court in evaluating the propriety of intervention. For example, a witness who testified about a particular practice and who otherwise meets the necessary test may be a likely representative. *See Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326 (4th Cir. 1983). If, however, no proper class representative is available, then that claim must be dismissed as to the class. *See Scott v. City of Anniston, Alabama*, 682 F.2d 1353 (11th Cir. 1982); *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608 (5th Cir. 1983). *Cf. Vuyanich v. Republic Nat'l Bank of Dallas*, 723 F.2d 1195 (5th Cir. 1984).

Assuming that a proper class representative is appointed, the next step would be to determine whether the findings from the original trial may be reinstated. In reaching a decision on this question, the district court must consider whether either side will be prejudiced. This will require determination of whether those findings would have been different had the new class representative been on board at that time. An intervenor or new class representative seeking to salvage the original findings has the burden of proving that the prior defect in class representation did not affect those determinations. In the event of such proof, the previous findings may be reinstated.

On remand, the district court has the benefit of hindsight. As the court of appeals said in the *Hill* case, "[t]o the extent inadequacy is based solely upon lack of sufficient identity of interest, any presumed adverse effect on the merits stemming from this may in fact be utterly belied by the outcome." 672 F.2d at 389. *See also Scott*

v. University of Delaware, 601 F.2d at 87 n.22. If the results of the original trial were favorable to the class, then there may be no reason to assume that reinstatement would be prejudicial to the class.

The district court also has the responsibility of determining whether it would be unfair to defendants to reinstate the findings. That the net effect is to revive an adverse result is not in itself a sufficient showing of prejudice. Rather, the court should consider whether the defendants' preparation and tactics would have been different had other class representatives been in place at the earlier trial. In other words, the question is would defendants have conducted the litigation differently in some material way absent the defect in representation in the prior proceeding. *See Dickerson v. United States Steel Corp.*, 582 F.2d 827 (3d Cir. 1978). *Cf. Mullaney v. Anderson*, 342 U.S. 415, 417 (1952) (Joinder of new parties permissible where their earlier presence would not "have in any way affected the course of the litigation").

We do not limit the district court in its inquiry but only point to a few of the considerations that should be examined.

C.

Plaintiffs contend that the United Political Action Committee—an unincorporated association composed predominantly of black citizens in the vicinity of the Lukens plant, some of whom are employed by the company—should be permitted to act as a class representative. The record in this case does not contain adequate factual material to justify the committee's capacity to act as a class representative. *See General Telephone Co. of the Southwest v. Falcon.*

Accordingly, we conclude that on this record no named plaintiff could adequately represent the class in the claim of racial discrimination in initial work assignments. On remand, the district court may consider the intervention

and appointment of appropriate class representatives as well as possible reinstatement of the original findings.

III.

CLAIMS AGAINST THE UNIONS

The district court concluded that the evidence did not support the plaintiffs' claims about racial discrimination in the general handling of grievances by the unions, including references to arbitration. The delay in processing grievances and the decision to abandon those of a less serious nature were, in the court's view, practices legitimately complained of by both black and white workers. However, the court did find that the unions discriminated against the plaintiff class in violation of both § 1981 and Title VII.

Collective bargaining agreements beginning in 1965 had prohibited the company from discriminating against any employee, probationary or permanent, on racial grounds. Nevertheless, although they knew that blacks were being discharged at a disproportionate rate during the probationary period, the locals failed to file grievances challenging that practice, pursuant to a union policy of not grieving complaints of probationary employees.[9]

The unions were reluctant to assert racial bias as a basis for a grievance even when they believed that element was implicated. The court found this policy to perpetuate the discriminatory environment and "render the non-discrimination clause in the collective bargaining agreement a dead letter." 580 F. Supp. at 1160.

The unions argued before the district court that simple inactivity could not make them liable under Title VII or § 1981. The district court rejected that contention, but went on to hold that "the evidence in this case proves far

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[9] We reject the unions' contention that the district court's findings were clearly erroneous as to this matter.

more than mere passivity on the part of the unions." The court further commented that "[a] union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under both Title [VII] and § 1981 regardless of" its leadership's favorable disposition towards blacks. *Id.* at 1160.

On appeal, the unions repeat their argument that mere passivity should not subject them to liability because such inaction is not within the scope of § 703(c) of Title VII addressing union responsibility. That section of the Act provides in pertinent part that it is an unlawful employment practice for a union:

> "(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> * * * *
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

42 U.S.C. § 2000e-2(c).

The union argues that passivity does not "cause" the employer to discriminate and faults *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973), for holding a union liable without any reference to the text of the statute. Although the *Macklin* case has been criticized, *see* Larson, *Employment Discrimination*, § 44.50, other cases have echoed its premise that there is an affirmative duty on the part of the unions to combat discrimination in the workplace. *See, e.g., Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982); *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981); *Romero v. Union Pacific R.R.*, 615 F.2d 1303

(10th Cir. 1980); *Donnell v. General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978); *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974).

In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), the plaintiffs contended that disproportionate discipline had been imposed on them because of their race. They alleged that the union "had acquiesced and/or joined in" the employer's discrimination. The Court did not accept the union's defense that in representing a number of employees it is sometimes necessary to compromise the grievance of one.

> "We reject the argument. The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them."

427 U.S. at 285.

The case against the unions here is stronger than one of mere acquiescence. The district court found that the unions intentionally avoided asserting claims of discrimination. In so doing, the unions violated the duty of fair representation owed to their members. *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944); *see also*, Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702 (1980).

By shirking their responsibility for presenting grievances based on discrimination, the unions also violated the duty to enforce the collective bargaining agreement. *See Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81 (3d Cir. 1982). The deliberate choice not to process grievances also violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation. The district court's finding of

intentional discrimination properly supports the claims under § 1981 as well. We therefore find no error in the district court's assessment of liability against the unions.

IV.

STATUTE OF LIMITATIONS AS TO THE TITLE VII CLAIMS AGAINST THE UNIONS

Plaintiff Hicks filed charges against Lukens before the Pennsylvania Human Rights Commission on December 2, 1971. The unions were not named in that complaint. On January 28, 1972, however, Hicks along with named plaintiffs Goodman, Meeks, and Middleton filed broad charges of discrimination against Lukens, the International Union, and Local 1165 with the EEOC. The Commission deferred these charges to the Pennsylvania Human Relations Commission on February 16, 1972, and filed them on May 7, 1972. Local 2295 was first named in an amended charge filed by plaintiff Meeks on June 13, 1972.

Because the statute allows the state agency sixty days to dispose of a claim, 42 U.S.C. § 2000e-5(c), the earliest that Hicks' original charge could be considered filed with the EEOC was January 31, 1972. Based on that date, the district court found that the limitation period for Title VII claims against the unions began on April 6, 1971. That determination is correct only if the initial filing in the state Commission against Lukens is construed to include claims against the unions as well.

In *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394 (3d Cir. 1976), we held that the scope of a Title VII action is defined by the limits of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. That case, however, involved only one defendant, and we did not hold that the scope of the investigation could include unnamed parties.

Glus v. G. C. Murphy Co., 629 F.2d 248 (3d Cir. 1980), held that charges against an unnamed international union could be adjudicated because the original complaint before the EEOC had named a local union whose interests were the same and the international had received notice. Neither of those two conditions apply here. The charge filed by Hicks was not against a union, but against the employer. We do not find the commonality of interest and actual notice which would make *Glus* applicable. Therefore, no charges were cognizable against the unions until the January 28, 1972 filing with the EEOC.

In *Mohasco Corp. v. Silver*, 447 U.S. 807, 814 n.16 (1980), the Court held that "a complainant in a deferral State [as is Pennsylvania] . . . need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved." Plaintiffs ask that they be given the benefit of this 240 day rule. That would produce a limitations period commencing June 2, 1971, somewhat longer than that advocated by the unions. Although we can foresee another case in which a plaintiff might be entitled to a longer period, in light of the plaintiffs' concession here, we conclude that the June 2 starting date is appropriate.

We do not find a different limitation period applicable to Local 2295. The identity of interest and notice provisions of *Glus* are applicable in this situation; therefore, Local 2295 will be governed by the same effective limitations date, June 2, 1971.

The correction of the limitations date for Title VII claims against the unions will not affect the injunctive relief directed by the district court. It might, however, make a difference in the assessment of damages, and accordingly we feel obligated to make a ruling on the point.

V.

INCENTIVE PAY FOR THE PIT CREWS

The district court found that the company's policy of denying incentive pay to workers in the open hearth pits while making it available to other workers amounted to discrimination. The open hearth pit crews were predominantly black. Their assignment was to prepare molds to receive molten metal, pour the metal, and remove the molds after the metal had hardened. At a higher physical elevation in the plant, workers on the melting "floor" placed the raw materials into the furnaces for melting and supervised that process. These predominantly white crews received incentive pay, as did other workers in the Lukens facility.

The court reasoned that "[g]iven the fact that the company paid incentive bonuses to the 'floor' personnel, . . . [its] refusal to accord the same benefit to the pit personnel had no legitimate justification. I find that this was a clear instance of racial discrimination." 589 F. Supp. at 1138.

In reviewing factual findings made by a district court, we apply the clearly erroneous standard set out in Fed. R. Civ. P. 52(a). As the Supreme Court stated in *Anderson v. City of Bessemer City*, 53 U.S.L.W. 4314 (March 19, 1985), this standard is used "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.* at 4317. The Rule clearly requires deference to the findings of the trial judge, but it does not relieve the court of appeals from its responsibility to correct findings of fact when it is left "with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

As an appellate court, we have an advantage over the trial judge in that the parties have had ample oppor-

tunity after trial to review the record in detail and point out specific references to support their position. Moreover, the attention of the litigants is restricted to a narrow area in which they hope the challenge may be successful. That process differs from the broad gauge approach which is followed in the district court, where the requests for findings are being compiled in the first instance from voluminous testimony and exhibits and without any indication of the trial court's ultimate rulings. This is particularly true in a case as massive as this one.

After a painstaking review of every record reference to which the parties have cited us, we have come to the conclusion that in this instance, a mistake was made.

It is undisputed that the incentive pay issue was one long standing which began before the limitations period. Both testimony and documents disclose that the union on a number of occasions had asked the company to grant incentive pay to the pit crew. The employer's response was consistent—it would include the pit crew in the incentive plan only if the company was given the opportunity to reduce the size of the crew. On each occasion, and there were several, when the employer submitted this proposition to the members of the pit crew, they rejected it. Not only did the pit crew turn down the company's proposal, but the crane crews in the pit—another seniority subdivision—did so as well.

One union official who discussed the company's proposal with the workers recalled that about equal numbers of black and white workers were present at a meeting to vote on the proposal. Although plaintiffs suggest that other groups receiving incentive pay also had agreements on crew size, testimony reveals that these arrangements were not comparable to those with the pit and crane crews.

Another union witness described the particularly close relationship among the workers in the pit crew. The men

consistently presented a united front to the company and were most solicitous of each member's safety and well being. When one reads the testimony against this background, it is understandable why the pit crew would not sacrifice the jobs of its members in exchange for higher pay for those who would retain their positions.

The evidence is equally clear why the employer insisted on the trade-off. Company officials testified that the pit crews were overmanned and that the facilities of the plant were limited. Any increase in efficiency had to come from a reduction in crew size. In these circumstances, incentive pay would not be economically advantageous to the company because the capacity of the facility had already been reached and increased efficiency by the already overabundant manpower could not result in greater production.

The testimony does not support any inference that denial of incentive pay was racially inspired. The company's position on a trade-off was consistently maintained and was unrelated to race. That conclusion finds reinforcement in the company's experience with the die shop workers. Early collective bargaining agreements showed that both the pit crew and die shop group were not included in the incentive pay plan. However, when the die shop employees agreed that the company would be under no restriction as to crew size, they did receive incentive pay.

The record citations to which plaintiffs have referred us do not furnish any basis for concluding that the company's reason for denying incentive pay was pretextual. Indeed, the weakness on this point in the otherwise vigorous and well-documented plaintiffs' brief is eloquent in itself.

After our review, we conclude that the finding on incentive pay to the pit crews is clearly erroneous, and on this claim, the judgment of the district court must be reversed.

VI.

LUKENS OTHER CONTENTIONS

In addition to the matters which have been discussed above, Lukens has raised other claims of error. It contends that the trial judge erred by impermissibly shifting the burden of proof to the defendant. We find no merit to this argument. In the introduction to his opinion, the trial judge reviewed the leading cases of *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). He stated clearly that the burden of proof was on plaintiffs. We are not persuaded that the casual references in the opinion to which Luken points should be interpreted as contradicting the earlier unambiguous allocation of the burden of proof.

The court's opinion similarly displayed a thorough understanding of the difference between disparate impact and disparate treatment cases and of the relevant evidence under each theory. The defendant takes exception to the district judge's comment that

> "One must be careful not to over-categorize in this context. The analytical distinctions . . . are of only limited utility. The ultimate questions to be answered are essentially the same in all employment discrimination cases: Has the defendant caused a given employee or group of employees to be discriminated against? . . . Is the action or conduct complained of justifiable . . .?"

580 F. Supp. at 1121.

We find no fault with these observations. In *Dillon v. Coles*, 746 F.2d 998 (3d Cir. 1984), we similarly commented on excessive preoccupation with the various formulae used in an employment discrimination case and observed that they are simply tools designed to aid in the analysis of evidence. The ultimate question remains

whether the defendant has discriminated. The presumptions and shifting burdens are merely an aid—not ends in themselves. When direct evidence is available, problems of proof are no different than in other civil cases. *See Trans World Airlines, Inc. v. Thurston*, —— U.S. ——, 105 S.Ct. 613, 622 (1985); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). If judges lose sight of the ultimate question, the analysis intended to aid in the process will instead have become a hinderance.

Lukens also argues that the district court misapplied evidence by failing to recognize that a statistical variation in itself does not establish discrimination unless the record also shows the requisite availability of positions and the qualification of the claimants. We do not so read the district court's opinion. In considering the statistical data presented as part of the plaintiffs' case, the court demonstrated its recognition of the limits of such evidence and the caution with which it must be viewed. The court noted that to prevail the class was required to prove that "disparate treatment exists and is the defendant's regular and standard operating procedure." 580 F. Supp. at 1120. In another part of the opinion, the court made clear that it had considered Lukens' "attempts to show that [the plaintiffs'] comparisons are faulty because of factual dissimilarities." *Id.*

We repeat once again that the clearly erroneous rule applies to our review of factual findings, including those based in part on statistical data. Statistical proof in Title VII cases must be evaluated in light of the "surrounding facts and circumstances." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977). In *Dothard v. Rawlinson*, 433 U.S. 321, 338 (1977), Justice Rehnquist in his concurring opinion wrote, "[i]t is for the District Court, in the first instance, to determine

whether these statistics appear sufficiently probative of the ultimate fact in issue. . . . In making this determination, such statistics are to be considered in light of all other relevant facts and circumstances." *See also Holsey v. Armour & Co.*, 743 F.2d 199, 215 (4th Cir. 1984).

We have reviewed Lukens' remaining contentions using this standard. We cannot say that the findings made by the district court are clearly erroneous, nor do we find error in the legal guidelines used by the court in reaching these remaining findings. Therefore, the judgment of the district court with respect to the instances of discrimination not previously discussed will be affirmed.

VII.

SUMMARY

1. The district court's findings that Lukens discriminated in transfers to salary positions and toleration of racial harassment will be vacated and the matters remanded for further consideration in light of our ruling on the appropriate statute of limitations for the § 1981 claims.

2. The district court's finding in favor of the class with respect to initial assignments will be vacated and remanded for reconsideration in light of our ruling on class representation.

3. The limitations period pertaining to the Title VII claims against the unions shall be adjusted in accordance with the views expressed above.

4. The finding of discrimination in the denial of incentive pay for the pit crews is reversed and judgment shall be entered for the defendant on that claim.

5. In all other respects, the judgment of the district court will be affirmed.

GARTH, *Circuit Judge*, dissenting:

I agree with the majority's analysis and disposition of all the issues presented in this appeal except for one. I respectfully dissent from the majority's holding that the statute of limitations for a cause of action under 42 U.S.C. § 1981 is limited in Pennsylvania to two years rather than the six year period applied by the district court.

The court today relies on *Wilson v. Garcia*, 105 S.Ct. 1938 (1985), in which the Supreme Court held that all claims under § 1983 should be subject to a state's corresponding personal injury statute of limitations. Although *Wilson* does not address § 1981 claims, the court concludes that *Wilson*'s reasoning compels identical limitations treatment for all reconstruction Civil Rights claims. This conclusion is inconsistent with history, precedent, and logic, and in any event is not required by *Wilson*.

While the majority's holding may not bar the civil rights claims asserted in this case, since violations of § 1981 may be found to have occurred within the shorter limitation period, the majority's discussion and holding necessarily will have ramifications far beyond the appeal which we decide today. I therefore write separately to record my disagreement with the majority's analysis.

I.

Prior to *Wilson v. Garcia*, this court applied a case-by-case analysis in determining which statute of limitations was most appropriate for a particular civil rights cause of action. *Polite v. Diehl*, 507 F.2d 119 (3d Cir. 1974) (in banc). Under this analysis, we have generally held that claims under § 1981 are governed in Pennsylvania by that state's six-year statute of limitations. *See, e.g., Davis v. United States Steel Supply*, 581 F.2d 335, 341 (3d Cir. 1978), *cert. denied*, 460 U.S. 1014 (1983);

Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 902-03 (3d Cir. 1977).

In *Davis*, we held that a § 1981 claim of racial discrimination in employment, the gravamen of which was interference with economic rights and interests rather than personal injury, should be governed by Pennsylvania's six-year limitations period. 42 Pa. Cons. Stat. Ann. § 5527 (Purdon 1982). Unless it has been overruled by *Wilson*, *Davis* would appear to control the present case, where the gist of the cause of action is economic rather than bodily injury caused by interference with the employment rights of black workers.

Wilson holds that "the federal interests in uniformity, certainty, and the minimization of unnecessary litigation" requires that all § 1983 claims be governed by the state statute of limitations in a given state: that state's personal injury statute. 105 S.Ct. at 1947. Because *Wilson* looks to § 1988 for its authority to apply state limitations periods in civil rights actions, and § 1988 by its terms covers all of the Reconstruction sections, the majority today concludes that *Wilson* mandates that all civil rights actions be governed by a state's personal injury limitation period. This conclusion is at best an arguable extension of *Wilson*'s analysis; it is by no means the holding of *Wilson* or an inexorable outgrowth of the case. In the absence of a square holding which overrules Third Circuit precedent, however, we remain bound by *Davis* to apply the six-year limitation period. It is not enough if *Wilson* merely undermines or raises questions about our prior analysis. Until the Supreme Court actually decides the limitation period for a § 1981 claim, or unless *Wilson* would admit of no other reasonable reading, only an in banc decision of this court can overrule *Davis*. *See* Third Circuit Internal Operating Procedures VIII C.[1]

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[1] *Compare* Rubin v. Buckman, 727 F.2d 71, 73-74 (3d Cir. 1984) (Garth, J., concurring) (in banc hearing not necessary to overrule prior panel when earlier case violated "consistent and explicit" rule and was "obviously in conflict with Supreme Court precedent.").

A close reading of *Wilson* reveals that the majority's view is neither an inevitable nor even the most plausible reading of the case. *Wilson*'s holding that all § 1983 claims should be decided in a given state under the same statute of limitations follows from the Supreme Court's view that § 1983 claims are best analogized to state tort actions for personal injuries. *Id.* at 1947. Having made this analogy as a matter of federal law, the Court adopted New Mexico's three-year personal injury statute of limitations out of deference to the state's judgment regarding "the proper balance between policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Id.* at 1945.

Nothing in *Wilson* addresses § 1981, which has a different history and purpose. *See* Section II infra. If *Wilson* has any effect on this case, therefore, it is merely to suggest that a single, uniform statute of limitations should be applied in each state to all cases under § 1981 instead of the case-by-case approach of *Polite*. Whether that would be the two-year personal injury period now applied in Pennsylvania for § 1983 claims, *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985), or some other limitation period dictated by the nature of § 1981, is a question beyond the scope of *Wilson*. Even if *Wilson* does require us to select a single statute of limitations for all § 1981 claims, it does not necessarily erase the distinctions between § 1981 and § 1983 recognized in *Davis* and *Meyer*.[2] These cases would therefore weigh heavily toward our selection of six years as the most appropriate uniform period of limitations for § 1981 claims. In short,

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[2] While *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985), discusses *Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978), *cert. denied*, 460 U.S. 1014 (1983), in following *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), *Smith* was a § 1983 case. The *Smith* court erroneously cited *Davis* as a § 1983 case decided under the discredited case-by-case approach of *Polite*, 1764 F.2d at 193. In fact, *Davis* was a § 1981 case, and as such, is not controlled either by *Smith* or *Wilson*.

not only does *Wilson* not require today's result, but it can plausibly be read as support for a uniform six-year statute of limitations for § 1981 claims in Pennsylvania.

II.

An examination of the history, purpose, and application of § 1981 in contrast to the history, purpose and application of § 1983, supports the conclusion that Pennsylvania's six-year statute of limitations for contract and trespass actions is the most appropriate one to apply to the § 1981 claim before us. While it is true, as the majority notes, that both § 1981 and § 1983 are concerned broadly with protecting the equal legal status of every person before the law, and that there is substantial overlap in the cases that may properly be brought under the two sections, there are still significant differences between the two. In short, § 1983 was conceived, and has been generally applied, as a personal injury statute. Section 1981, however, is more fundamentally concerned with injury to the contractual or economic rights of minorities, and as such should appropriately be governed by the longer contract statute of limitations.

A.

42 U.S.C. § 1981 was originally enacted as section one of the Civil Rights Act of 1866, was re-enacted as Section 16 of the 1870 Act, and was later included in the 1874 recodification. *Runyon v. McCrary*, 427 U.S. 160, 169 n.8 (1976). In its present form it provides:

> **§ 1981. Equal rights under the law**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens,

> and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

While the "full and equal benefit" and "penalties" clauses give § 1981 broad applicability beyond the mere right to contract. *Mahone v. Waddle*, 564 F.2d 1018, 1028 (3d Cir. 1977), *cert. denied sub. nom., City of Pittsburgh v. Mahone*, 438 U.S. 904 (1978), speeches and testimony at the time of § 1981's enactment, demonstrate the predominantly economic focus of Section 1 of the 1866 Act.

Concerned with removing the badges and incidents of slavery, the legislators of 1866 believed that if economic freedom was protected, social freedom and equality would follow. Senator Trumbull, who introduced the 1866 Act, specified certain "great fundamental rights" denied to freedmen by former slave states:

> the right to acquire property, the right to come and go at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property.

Cong. Globe, 39th Cong., 1st Sess. 475 (1866), quoted in *Jones v. Alfred E. Mayer Co.*, 392 U.S. 409, 432 (1968).

The bills' supporters believed that freedom would be valueless to men not assured an equal opportunity to bargain for their labors. Illustrative of this economic concern are the words of Rep. Lawrence of Ohio delivered in a detailed speech to the House:

> It is idle to say a citizen shall have the right to life, yet deny him the right to labor, whereby he alone can live. It is a mockery to say a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor.

> Every citizen, therefore, has the absolute right to life, the right to personal security, personal liberty, and the right to acquire and enjoy property. These are rights of citizenship. As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property.

Cong. Globe, 39th Cong., 1st Sess. 1832.

On March 2, Rep. Windom of Minnesota stated his understanding of the scope of the bill:

> Its object is to secure to a poor weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil.

Id. at 1159.

In 1865, the President commissioned Brigadier General Carl Schurz to tour the five most war-ravaged states to report on conditions there and suggest measures to overcome post war problems. In Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. at 21 (1865), Schurz concluded:

> It is, indeed, not probable that a general attempt will be made to restore slavery in its old form, on account of the barriers which such an attempt will find in its way; but there are systems intermediate between slavery as it formerly existed in the south, and free labor as it exists in the north, but more nearly related to the former than to the latter, the introduction of which will be attempted.

This intermediate state between slavery and free labor referred to by General Schurz was created in large part by the Black Codes enacted by Southern states. While specifying that blacks had the right to buy, sell, own and

bequeath real and personal property, the right to contract, to sue and be sued, and to testify in court, these rights only related to blacks' relationship with other blacks. The Codes authorized unequal punishment for freedmen's offenses, restricted travel and residence, and established an etiquette of deference to whites. In addition, the Codes severely limited economic rights. Blacks were forbidden the pursuit of certain occupations. They were subject to various master-servant statutes, vagrancy and pauper provisions that incorporated enforced labor, apprenticeship regulations, and elaborate labor contract statutes, especially pertaining to farm labor. Hyman & Wiecek, *Equal Justice Under the Law* 319-320 (1982).

It was within this historical context that the Act of 1866 and the vetoed Freedmen's Bureau Amendment were proposed. The perception of Civil Rights in the 19th century, while encompassing personal safety, was cast largely in economic terms by the definition of legal relationships, responsibilities, and remedies. It is evident, therefore, that § 1981 derived from an Act that was designed to ensure predominantly economic rights for newly freed blacks.

Moreover, 42 U.S.C. § 1982, which is recognized as a companion to § 1981, is by its plain language solely addressed to economic concerns. It reads:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Reading the two sections in conjunction, the 1866 Congress intended to end all discrimination and guarantee all citizens the opportunity to participate in the free market economy. Citizens were now free to make and enforce contracts for personal services and real and personal property. From their wording and identical legislative history, the two sections have been construed

similarly. Both § 1981 and § 1982 reach private conduct. *Runyan*, 427 U.S. at 170. *See Johnson v. Railway Express*, 421 U.S. 454, 460 (1975); *Tillman v. Wheaton-Haven Recreation Assoc.*, 410 U.S. 431, 439-440 (1972). Both § 1981 and § 1982 are directed at the same kind of discrimination: racial animus. *Jones*, 392 U.S. at 426. Both sections share a similar purpose, ensuring predominantly economic rights, and have been given similar construction. *See Meyers v. Pennypack Home Owners Assoc.*, 559 F.2d 894 (3d Cir. 1979). Therefore, both sections most appropriately belong under a state statute of limitations governing economic and contract actions.

B.

Section 1983, in contrast, reveals a very different legislative history, purpose, and application from § 1981 and § 1982. Section 1983 was enacted by Congress pursuant to § 5 of the fourteenth amendment in order to enforce that amendment. *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

42 U.S.C. § 1983 in its revised form reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

Section 1983 was enacted as section 1 of the Civil Rights Act of 1871. *Adicks v. Kress*, 398 U.S. 144, 162 (1969). It arose from and was designed to respond to an entirely different set of circumstances than those which led to the original enactment of what became § 1981. As I have previously observed in discussing § 1981, the 1866 Con-

gress was concerned with granting freedom and equality through economic guarantees which had long been denied the now newly freed blacks. It was economic freedom which enabled a man to be free. The focus was to identify those rights, previously denied, that would enable a person to sustain himself and his family once the mechanism of the master-slave society was dismantled. These concerns stand in sharp contrast to concerns about violence, physical injury and lawlessness that motivated the Congress of 1871.

After the passage of the thirteenth amendment and the 1866 Act, Southern resistance to Reconstruction mounted. Ku Klux Klan activity and atrocities increased. White vigilantes were described as having whipped, robbed, and murdered blacks. On March 3, 1871, President Grant, declaring that anarchy reigned in the South and that the states were powerless to control widespread violence, requested emergency legislation. In order to suppress the Klan and provide civil rights protection against official inaction and toleration of private lawlessness, Congress passed the Ku Klux Klan Act, which became known as the Civil Rights Act of 1871. *See Brisco v. LaHue*, 460 U.S. 325, 340 (1983).

In characterizing all § 1983 claims as personal injury actions for limitations purposes, the Supreme Court looked to "the historical catalyst for the 1871 Act, the campaign of violence and deception in the south fomented by the Ku Klux Klan." *Wilson v. Garcia*, 105 S. Ct. 1938, 1947 (1985). "The atrocities that concerned Congress in 1871 plainly sounded in tort . . . ." *Id.* at 1948. In characterizing claims under § 1981, we should follow the Supreme Court's analysis and look to the very different underlying purpose and historical catalyst for the Act of 1866.

C.

In addition to their contrasting histories and purposes, § 1981 and § 1983 have been applied differently. Section

1983 encompasses a broad range of actions sounding in tort, including injuries under color of state law to a person or his property and infringements of individual liberties. *Id.* at 1948. Cases under § 1983 "often involve elements that are similar to state causes of action for personal injury." *Jones v. United Gas Improvement Corp.*, 383 F. Supp. 420, 431 (E.D. Pa. 1974). *See also Harris v. Commonwealth*, 419 F. Supp. 10, 14 (M.D. Pa. 1976).

By contrast, the vast majority of cases brought under § 1981 arise out of some economic relationship consisting of more patterned sorts of behavior, frequently involving documentary proof in the form of employment records. *Dudley v. Textron, Inc.*, 386 F. Supp. 602, 606 (W.D. Pa. 1974). Indeed, the plain language of § 1981 supports the Supreme Court's own characterization of the statute: "[Section 1981] on its face relates primarily to racial discrimination in the making and enforcement of contracts." *Johnson v. Railway Express*, 421 U.S. 454, 459 (1975).

In addition, a review of the elements of causes of action brought under § 1981 and § 1983 further suggests that the two acts should be construed separately. Section 1983 requires, by its language and purpose, state action, while § 1981 can extend to acts of private discrimination. *Mahone v. Waddle*, 564 F.2d at 1031; *Jones v. Mayer Co.*, 392 U.S. at 437; *Johnson v. Railway Express*, 421 U.S. at 460. Section 1981 also requires racial animus, *Jones v. Mayer Co.*, 392 U.S. at 426, as well as discriminatory intent. *Croker v. Boeing Co.*, 662 F.2d 975, 988 (3d Cir. 1981) (en banc); *Craig v. County of Los Angeles*, 626 F.2d 659, 668 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). By contrast, racial animus need not be an element in a § 1983 cause of action, nor is there a requirement of intentional conduct or any other particular state of mind as a prerequisite to recovery. *Parrat v. Taylor*, 451 U.S. 527, 534-535 (1980).

III.

The majority concludes that unless claims under § 1981 are governed by the same statute of limitations as those under § 1983, the federal interest in uniformity and certainty in litigation as expressed in *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), will be frustrated. The majority further concludes that, since the same facts could in some cases support a claim under either § 1981 or § 1983, applying different statutes of limitation would lead to a "bizarre result." Typescript at 12. While admittedly an overlap of 1981 and 1983 causes of action exists, that is no reason to ignore the significant differences in history, purpose, and application between the two causes of action outlined above. But just as some similarities between § 1981 and § 1983 may be recognized, so too are there differences in dimension between these two actions. These differences reflect traditional distinctions between tort and contract law which have legitimate, practical purposes under both state law and the federal Civil Rights statutes. In that context, I suggest that the majority's concerns about uniformity are misplaced and given greater weight than that to which they are entitled. Therefore, in addition to precedent and history, logic militates against today's holding.

The majority bases its uniformity argument largely on 42 U.S.C. § 1988, which provides that state law is to be consulted in setting the period of limitation for all civil rights claims. *Wilson*, 105 S. Ct. at 1943. Finding it "most significant" that § 1988 applies to both § 1981 and § 1983, typescript at 10, the majority concludes that the federal interest in uniformity in the enforcement of the civil rights statutes requires a common period of limitation.

Nothing in § 1988, however, requires that result. The statute only mandates that in cases where the laws of the United States "are not adapted to the object" of enforcing civil rights,

> the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

If anything, this language supports a measure of deference to state law distinctions between tort and contract actions, so long as these distinctions are reflected in differences between and among the civil rights sections, and are therefore consistent with Federal law.

In fact, these tort-contract distinctions are real and substantial. First of all, as this court noted in *Meyers v. Pennypack Home Owners Assoc.*, 559 F.2d 894, 903 (3d Cir. 1979):

> "[T]he passage of time is less likely to impede the proof of facts" in a section 1981 and section 1982 action than in a state law physical injury action or a federal action under 42 U.S.C. § 1983, for example, and a longer statute of limitations may be appropriate.

(quoting *Dudley v. Textron, Inc.*, 386 F. Supp. 602 (E.D. Pa. 1979)).

Second, a longer statute of limitation for § 1981 claims relating to economic discrimination might actually *reduce* federal litigation, as a plaintiff before proceeding in federal court could afford to wait until the disposition of an administrative action—for example, an action brought under the Fair Housing Act or Title VII—which would be more likely to overlap with a § 1981 action than with a § 1983 action.

That state legislatures have good reasons for distinguishing between contract and personal injury actions was noted by Justice O'Connor:

> [T]he legislative judgment to which this Court has traditionally deferred is not some purely arbitrary imposition of a conveniently uniform time limit. For example, a legislature's selection of differing limitations periods for a claim sounding in defamation and one based on a written contract is grounded in its evaluation of the characteristics of those claims relevant to the realistic life-expectancy of the evidence and the adversary's reasonable expectations of repose.

Wilson, 105 S. Ct. at 1950 (O'Connor, J., dissenting).

Similarly, there is good reason for treating § 1981 claims, which focus on economic discrimination often involving contracts and longer periods of patterned behavior, differently from § 1983 claims, which, by and large, more closely resemble torts for personal injury which result from discrete and more sharply identified events. The federal interest in uniformity and predictability is adequately served by treating alike all claims under a given section; it does not require that all claims under separate and distinct statutes be treated identically.

Furthermore, the majority's sought-after "uniformity" is illusory. Even among § 1983 claims, *Wilson* does not require identical treatment throughout the country, since different states may have different personal injury limitations periods. In fact, in *Wilson*, a three-year period was applied, rather than the two year period adopted by today's decision. 105 S. Ct. at 1949, or the one year period found appropriated for Mississippi by the Fifth Circuit in *Gates v. Spinks*, No. 84-4605, slip op. at 7018 (5th Cir. September 26, 1985). Thus, *Wilson* defers to state judgment on the appropriate balance of interests in setting the limitation period, even though it results in different periods being applied in § 1983 cases in New Mexico, Pennsylvania, Mississippi, and elsewhere throughout these United States. There is no reason not to defer

similarly to state judgments that actions sounding in contract should be governed by a longer limitation period.

The majority's concern that applying a longer limitation period for § 1981 would lead to a "bizarre result" is unfounded. It is true that the same nucleus of operative fact sometimes could be characterized as either a § 1981 and or § 1983 claim and thereby receive different limitations treatment if the six-year statute was applied under § 1981. Such variations, however, are commonplace in the law. In a run-of-the-mill automobile accident case, for example, identical facts could give rise to warranty claims sounding in contract and strict liability claims sounding in tort—each to be governed by a different statute of limitations. This is not thought to be a "bizarre result," and the possibility that the same or similar facts could support causes of action under different Civil Rights statutes is no more "bizarre."

Moreover, facts that could support either a § 1981 or a § 1983 claim could frequently also support a claim under Title VII, which has a 300 day limitation period in a deferral state like Pennsylvania. 42 U.S.C. § 2000e-5(e). This disparity is tolerated, however, because Title VII is distinguishable from other Civil Rights provisions, just as § 1981 is distinguishable from § 1983. Title VII covers a narrower range of situations than does § 1981, but is not limited to racial animus and does not require intentional discrimination. "The choice [between Title VII and § 1981] is a valuable one. Under some circumstances the administrative route may be highly preferrable over the litigatory." *Johnson v. Railway Express*, 421 U.S. 454, 461 (1975). Moreover, "the remedies available under Title VII and under section 1981, although directed to most of the same ends, are separate, distinct, and independent." *Id.* Different statutes with different purposes may logically be governed by different statutes of limitation. Total uniformity in limitations periods for civil rights claims is therefore neither possible nor necessarily desirable.

In *Johnson*, 421 U.S. at 463-64, the Supreme Court stated:

> Although any statute of limitations is necessarily arbitrary, the length or period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting prosecution of stale ones . . . .

The legislatures of Pennsylvania, New Jersey, Delaware and the Virgin Islands have made such value judgments in distinguishing for limitations purposes between actions brought for contract and personal injury.[3] There is no reason why this court should not respect the recognition by the state legislatures that distinctions should be made, for limitations purposes, between actions for contract and personal injury, and conclude that such distinctions are properly reflected in the application of the civil rights statutes. Indeed, this court has so held. *See Davis v. United States Steel Supply*, 581 F.2d 335, 339 (3d Cir. 1978), *cert. denied*, 460 U.S. 1014 (1983); *Meyers*. Since *Wilson* does not compel a different result, we should stand by our sound prior analysis. For the foregoing reasons, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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[3] Pennsylvania, New Jersey and the Virgin Islands apply a six-year statute of limitations for contract actions. 42 Pa. Cons. Stat. § 5527 (1981); N.J. Stat. Ann. 2A:14-1 (West Supp. 1984); V.I. Code Ann. tit. 5 § 31(3)(A) (1967). Delaware provides for three years. Del. Code Ann. tit. 10 § 8106 (1975). Pennsylvania, New Jersey, Delaware and the Virgin Islands all apply the shorter two year limitation for actions brought for personal injury, 42 Pa. Cons. Stat. § 5524 (1981); N.J. Stat. Ann. 2A:14-2 (West 1952); Del. Code Ann. tit. 10 § 8119 (1975); V.I. Code Ann. tit. 5 § 31(5)(A) (1984 Supp.).

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. PENNSYLVANIA

Civ. A. No. 73-1328

CHARLES GOODMAN, *et al.*

v.

LUKENS STEEL COMPANY, *et al.*

Feb. 13, 1984

OPINION AND ORDER

FULLAM, District Judge.

INTRODUCTION

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INTRODUCTION

Plaintiffs in this class action alleging racial discrimination in employment seek equitable and monetary relief against both the defendant employer, Lukens Steel Company, and the defendant labor unions, the International and two local unions of the United Steelworkers of America. This Opinion addresses liability issues.

REVIEW OF LEGAL PRINCIPLES

A. *Title VII and § 1981*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is "a broad remedial measure, designed 'to assure equality of employment opportunities.'" *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 1783-84, 72 L.Ed.2d 66 (1982) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 1823, 36 L.Ed. 2d 668 (1973)). The Act bars not only overt employment discrimination—discrimination by disparate *treatment*—but also policies that are superficially neutral but discriminatory in operation—discrimination by disparate *impact*. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). Both types of discrimination are here alleged both by the individual plaintiffs and by the plaintiff class.

As the Supreme Court has noted, disparate treatment

> is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977).

The plaintiffs must show "not only 'the existence of disparate treatment but also that such treatment was caused by purposeful or intentional discrimination.'" *Smithers v. Baular*, 629 F.2d 892, 895 (3d Cir.1980) (citations omitted).

The standard method of proving disparate treatment entails three steps. First, plaintiffs must establish a *prima facie* case. Next, the employer must articulate a legitimate business justification for its actions. If the employer does so, plaintiffs must then demonstrate that the proffered justification is merely a pretext for intentional discrimination. *McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. at 1825. Although the burden of production thus shifts from the plaintiff to the defendant and back again, the burden of persuasion remains with the plaintiffs throughout. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L. Ed.2d 207 (1981). In the Title VII context, the term "*prima facie* case" refers to the "establishment of a legally mandatory, rebuttable presumption" rather than the presentation of "enough evidence to permit the trier of fact to infer the fact at issue." *Id.* at 254 n. 7, 101 S.Ct. at 1094 n. 7 (1981).

The *McDonnell Douglas* plaintiffs alleged only discrimination in hiring; the particular elements of the *prima facie* case there identified have been modified to cover

discrimination in other contexts. *See* B. Schleir & P. Grossman, Employment Discrimination Law (2d ed. 1983) 1318-1321 nn. 82-90 (collecting and discussing cases on discharge, discipline, promotion, transfer, layoff, training, and job assignment).

Although an individual alleging disparate treatment is free to introduce direct evidence of a discriminatory intent, as a practical matter plaintiffs typically must rely on indirect evidence from which an inference of such intent can be drawn. Frequently, plaintiffs argue that the employer applied various policies differently to black and white employees; in response, the employer attempts to show that those comparisons are faulty because of factual dissimilarities. As trier of fact, the trial court must resolve these competing claims. *See, e.g., Worthy v. U.S. Steel Corp.*, 616 F.2d 698, 702-03 (3d Cir.1980).

At least in theory, the *McDonnell Douglas* analysis is also applicable to class actions alleging a "pattern or practice" of classwide disparate treatment. *Teamsters*, 431 U.S. at 355, 97 S.Ct. at 1854. The class plaintiffs must initially demonstrate, by a preponderance of the evidence, that a pattern of disparate treatment exists and is the defendant's regular and standard operating procedure. *Id.* Such evidence frequently takes the form of statistical data. *See Hazelwood School District v. U.S.*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977); *Wilmore v. City of Wilmington*, 699 F.2d 667 (3d Cir.1983). Once plaintiffs have produced such data, the defendant may rebut by showing flaws in the data or the statistical analysis. Absent a persuasive rebuttal, the court will infer that all class members were discriminated against in the fashion alleged.

The second, and more prevalent, theory of liability under Title VII allows plaintiffs to challenge employment policies which, though neutral on their face, are discriminatory in operation. These "disparate impact" cases do

not require proof of discriminatory motive. *Griggs*, 401 U.S. at 432, 91 S.Ct. at 854. In *Griggs* and its progeny, especially *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), the Supreme Court has articulated the procedure for proving such claims. The plaintiffs must first establish a *prima facie* case that the challenged procedure does in fact have a substantial adverse impact. Plaintiffs must also demonstrate "a causal connection between the challenged policy or regulation and a racially unequal result." *EEOC v. Greyhound*, 635 F.2d 188, 193 (3d Cir.1980). The defendants can then attempt to demonstrate that those statistics are deficient and thus insufficient to make out a *prima facie* case. *Dothord v. Tawlindson*, 433 U.S. 321, 331, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977).

If plaintiffs succeed in establishing a *prima facie* case, defendant must justify the challenged policy as job-related or otherwise a business necessity. *Albemarle*, 422 U.S. at 425, 95 S.Ct. at 2375. The burden of persuasion, however, remains with the plaintiffs; defendant's rebuttal burden is simply to "come forward with evidence to meet the inference of discrimination raised by the *prima facie* case." *Croker v. Boeing Co.*, 662 F.2d 975, 991 (3d Cir. 1981) (*en banc*)). If the defendant does so, plaintiffs must then show that "a feasible yet less onerous alternative exists." *Id.* (citations omitted). It has long been established that properly validated job-related tests are permissible even if they have a disparate impact. *Griggs*, 401 U.S. at 433-36, 91 S.Ct. at 854-856. Similarly, a bona fide seniority system—one which was not adopted with intent to discriminate—does not violate Title VII even though it has a discriminatory effect. *Teamsters*, 431 U.S. at 348-55, 97 S.Ct. at 1861-1864.

Section 1981

Section 1981 prohibits intentional racial discrimination in making and enforcing contracts and in securing

"equal benefit of all laws and proceedings." 42 U.S.C. § 1981. Proof of discriminatory intent is crucial; the provision "does not extend to facially neutral conduct having the consequences of burdening one race more than the other." *Croker*, 662 F.2d at 989. Although disparate impact thus is not itself actionable under § 1981, evidence of such impact "may be an important factor in proving racially discriminatory intent." *Id.*

Variations on the *McDonnell Douglas* formula for making out a *prima facie* case have also been applied in § 1981 cases. *See, e.g., Baldwin v. Birmingham Board of Education*, 648 F.2d 950, 955 (5th Cir.1981); *Tagupa v. Board of Directors*, 633 F.2d 1309, 1312 (9th Cir.1980). As under Title VII, once the plaintiffs have made a *prima facie* case, defendant must show a legitimate reason for its actions; thereafter, plaintiffs must show defendant's proffered reason is merely a pretext. *Baldwin*, 648 F.2d at 956.

To summarize, "disparate treatment" means simply that on a given occasion, one or more employees were treated less favorably because of their race; "pattern or practice" means simply a generalized version of this phenomenon; and "disparate impact" means simply that facially neutral policies or decisions have had a different, and adverse, impact on employees of a particular race.

One must be careful not to over-categorize in this context. The analytical distinctions outlined above are of only limited utility. The ultimate questions to be answered are essentially the same in all employment discrimination cases: Has the defendant caused a given employee or group of employees to be discriminated against? Because of race? Because of something that occurred within the limitations period? If the answers to all of these questions are in the affirmative, is the action or conduct complained of justifiable, by reason of business necessity, a bona fide seniority system, or other

legitimate factor? Both statistical and anecdotal evidence may be looked to in attempting to answer these questions (with, obviously, varying degrees of relevance and probative force).

Finally, a word about "intentional discrimination" or "discriminatory animus." The aim of the law is equality of treatment and equality of opportunity for all races. Attainment of that lofty goal can be expected, in the long run, to ameliorate subjective racial attitudes, but such attitudes are not directly implicated in the enforcement scheme. An employer who hates Jews or Negroes, but who suppresses those feelings and treats all races and creeds evenhandedly, is not in violation of either Title VII or § 1981. On the other hand, an employer who admires and respects all races equally, but who knowingly excludes qualified blacks from consideration for promotion because they are black, is guilty of intentional discrimination. An employer may inadvertently discriminate (as, for example, if the employer is unaware of the racial identity of the affected employee, or is unaware of the adverse treatment); there is no liability for such inadvertent consequences because, without more, an inference of an intent to discriminate on racial grounds would not be supportable. But an employer who persists in implementing racially neutral policies or practices with actual awareness that they adversely affect blacks in comparison to similarly situated whites, is, in the absence of some overriding justification (such as adherence to a bona fide seniority system, or business necessity/job-relatedness) in violation of Title VII.

B. *Limitations Period*

This action was instituted on July 14, 1973. The appropriate limitations period for claims arising under 42 U.S.C. § 1981 is six years (derived from the then-pertinent Pennsylvania statute, 12 P.S. § 31. *Davis v. U.S. Steel Supply*, 581 F.2d 335 (3d Cir.1978).

The applicable limitations period for claims arising under Title VII of the Civil Rights Act is set forth in § 706(e) of that statute, 42 U.S.C. § 2000e-5(e), as amended in 1972. The 1972 amendments apply to all cases in which charges were then pending before the EEOC. In the present case the plaintiffs Dantzler, Hicks, Goorman, Meeks and Middleton had charges pending before the EEOC when the 1972 amendments became effective. In these circumstances, the limitations period is measured from the original filing date in each case, not merely from the effective date of the 1972 amendments. See *Wood v. Southwestern Bell Telephone Co.*, 580 F.2d 339 (8th Cir.1978); *Inda v. United Airlines*, 565 F.2d 554, 560-61 (9th Cir.1977), *cert. denied*, 435 U.S. 1007, 98 S.Ct. 1877, 56 L.Ed.2d 388 (1978); *Dickerson v. United States Steel Corp.*, 439 F.Supp. 55, 69, n. 11 (E.D. Pa.1977), *vacated on other grounds, sub. nom. Worthy v. United States Steel Corp.*, 616 F.2d 698 (3d Cir. 1980).

It is clear that, with respect to the claims of the plaintiff class, all class members are entitled to the benefit of the earliest filing date of the named plaintiffs. *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 246 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975). Indeed, there is authority for the proposition that all class members are entitled to the benefit of the earliest filing by any member of the class, whether or not named as a plaintiff. *Webb v. Westinghouse Electric Corp.*, 78 F.R.D. 645, 653 n. 3 (E.D.Pa. 1978).

The plaintiff Dantzler first filed charges before the EEOC on December 7, 1970, followed by a related filing with the Pennsylvania Human Relations Commission on December 31, 1970. This action was filed within 90 days after Dantzler received his right-to-sue letter, and he was a member of the class. His bar-date, for all claims fairly encompassed within the charges filed, is May 4, 1970 (300 days before March 1, 1971, the date 60 days follow-

ing his initial filing with the Pennsylvania Human Relations Commission). In his original charges, Dantzler asserted a pattern of racial harassment, and discrimination in disciplinary decisions; his original charges named only Lukens as culpable. On August 10, 1972, Dantzler amended his charges to include the unions, and was thereafter permitted to intervene as a named plaintiff in this action.

The net effect of these circumstances, in my view, is that the entire class is permitted to assert Title VII claims against Lukens for the alleged pattern of racial harassment, and for discriminatory treatment in the administration of discipline, from and after May 4, 1970.

The named plaintiffs Goodman, Meeks, Hicks and Middleton filed broadscale charges against both Lukens and the union, before the EEOC, on January 28, 1972. This produces a starting date of April 6, 1971, for (a) all claims against the union defendants, and (b) all claims against Lukens not encompassed within the original filing by the plaintiff Dantzler.

To summarize, the following claims are cognizable in this litigation: (1) all claims for intentional discrimination, in violation of 42 U.S.C. § 1981, arising after July 14, 1967; (2) claims for Title VII violations by the defendant Lukens, in the form of racial harassment and discriminatory discipline, arising after May 4, 1970; (3) all other claims for class-wide discrimination, against both Lukens and the union defendants, arising after April 6, 1971; and (4) irrespective of the class issues, the individual claims of disparate treatment asserted by those individual plaintiffs who have been issued right-to-sue letters by the EEOC.

Thus, nothing which occurred before July 14, 1967 can support the grant of any relief in this litigation. Evidence concerning pre-1967 events is relevant only to the extent it sheds light upon events which occurred

during the limitations period. And nothing which occurred before May 4, 1970, can support the grant of any relief in this litigation absent proof of discriminatory animus.

FINDINGS OF FACT, AND DISCUSSION

I. THE PARTIES

1. Named plaintiffs Charles Goodman, David Dantzler, Jr., Ramon Middleton, John R. Hicks, III, Dock L. Meeks, Lymans Winfield and Romulus Jones are black employees or former employees of the defendant Lukens Steel Company. Dantzler, Middleton, Hicks, Meeks and Goodman are or were hourly employees; Winfield has worked in both hourly and salaried positions; and Jones is a salaried employee. The named plaintiffs represent a class consisting of all black persons who are, or who at any time on or after June 14, 1967 have been, or who in the future may be, employed by Lukens.

2. Plaintiff United Political Action Committee ("UPAC") is an unincorporated association formed to combat race discrimination in Chester County. In 1973, 32 of its members were past or present employees of Lukens (and were black). UPAC had received many complaints of racial discrimination at Lukens before this suit was filed.

3. Defendant Lukens is the oldest independent steel company in continuous production in the United States, and produces a variety of specialty plate steel products. Lukens' major production facility is located in Coatesville, Pennsylvania, and Lukens is the largest employer in Chester County. Until the mid-1950s, Lukens actually consisted of three separate corporations: Lukens Steel Company, By-Products Steel Company and Lukenweld, Inc. During the period of time directly involved in this litigation, all had been merged into a single corporation, Lukens Steel Company.

4. The total Lukens work force since 1967 has varied between approximately 4,200 and 5,300 employees. The total number of hourly employees at Lukens since 1967 has ranged between approximately 2600 and 3900.

5. Between 1967 and 1978, the percentage of black employees in the hourly work force at Lukens ranged from 21.8% to 24.1%.

6. The defendant United Steelworkers of America ("the International Union") and its local unions, the defendant Unions 1165 and 2295 ("the Local Unions") are labor unions, and are the certified collective bargaining agents of Lukens' hourly employees.

A predecessor of the International Union, the Steelworkers Organizing Committee ("SWOC") became the certified collective bargaining agent of Lukens' hourly employees in 1937. At or about the same time, Local 1165 began to represent hourly employees of Lukens and By-Products Steel Company, and Local 2295 began to represent Lukenweld employees.

II. JURISDICTION AND PROCEDURAL MATTERS

7. On December 7, 1970, named plaintiff David Dantzler, Jr. filed a charge of employment discrimination against Lukens with the Equal Employment Opportunity Commission ("EEOC"), alleging that he had been wrongfully terminated from employment on December 4, 1970, because of race. On December 31, 1970, Dantzler filed the same charge against Lukens with the Pennsylvania Human Relations Commission ("PHRC"). On August 10, 1972, Dantzler filed an amended charge of discrimination with the EEOC against both Lukens and Local 1165, alleging that, for reasons of race, Local 1165 had failed to represent him adequately in his disputes with Lukens.

8. On March 9, 1971, named plaintiff Ramon Middleton filed a charge of employment discrimination against Lukens with the Pennsylvania Human Relations Com-

mission, alleging racial discrimination in the staffing of the (then new) Strand Casting Subdivision, on or about March 1, 1971.

9. On January 28, 1972, named plaintiffs Middleton, Goodman, Meeks and Hicks filed with the EEOC broad charges of pervasive racial discrimination by Lukens and the International Union. Middleton, Meeks and Hicks also named Local 1165 in these charges. At a later date, Hicks deleted the unions from his charges, and Meeks amended his charges by adding Local 2295.

10. In due course, the EEOC found no probable cause to believe Title VII violations had occurred with respect to the various individual charges, and issued "right-to-sue" letters as follows: to Goodman on March 14, 1973; to Dantzler on March 30, 1973; to Middleton on April 13, 1973; to Hicks on June 6, 1973; and to Meeks on December 12, 1973. Although finding no probable cause to support the individual complaints, the EEOC did make a finding to the effect that Lukens under-utilized black employees on a plant-wide basis, and "has excluded blacks as a class from its supervisory and clerical positions . . . ." Because these findings relate to matters not encompassed within the specific charges then pending before the EEOC, they have no probative weight in the present case. They represent merely an adverse finding on issues which the company had never been called upon to defend. Their (marginal at best) relevance to this case is that they were communicated to Lukens and the unions, and therefore arguably should have alerted them to potential problems which should be addressed.

11. Plaintiffs Goodman, Middleton, Jones, Winfield and UPAC filed this suit on June 14, 1973. On June 16, 1975, the court granted plaintiffs Hicks, Dantzler and Meeks leave to intervene as parties plaintiff, and certified the case as a class action.

12. A hearing on plaintiffs' request for a preliminary injunction was held on October 2, 3, and 4, 1979. At

the conclusion of the hearing, the court rendered certain oral findings of fact and conclusions of law, and granted partial relief in a written order dated October 9, 1979.

13. The trial encompassed 32 days of testimony, over the period from February through June 1980.

14. After the testimony was transcribed, the parties submitted voluminous requests for findings of fact and conclusions of law, comments upon their adversaries' requests, post-trial briefs, etc. Plaintiffs' requests for findings of fact number 693 (many with numerous subparagraphs), covering 345 pages. The defendant Lukens filed a 595-paragraph, 265-page "response," and also filed its own request for findings of fact, numbering 550, set forth in 290 pages. The unions' "comments" cover 260 pages plus 2 appendices; and the unions submitted 427 separate findings of fact, covering 353 pages. In all, these materials aggregate 1,773 pages.

In addition, plaintiff submitted a 78-page post-trial brief; defendant Lukens' brief runs to 114 pages; the unions filed an 89-page brief with a 58-page appendix; and plaintiffs' reply brief totals 139 pages. Thus, the court was faced with some 478 pages of briefing. In addition, counsel have favored the court with a steady stream of letter-briefs clarifying, refining, and updating their respective positions.

III. BACKGROUND INFORMATION CONCERNING THE ORGANIZATION OF THE WORK FORCE AT LUKENS

A. *Hourly Work Force*

15. The relationship between Lukens' hourly employees and the company has been governed by collective bargaining agreements entered into every several years since 1937. Since 1957, these agreements have required hourly employees to hold union membership and pay union dues.

16. Lukens and the unions have regularly included in the Lukens' collective bargaining agreements the same terms and conditions adopted by the International Union and the largest nine or ten steel companies. This is known as "pattern bargaining."

17. Each hourly job at Lukens is assigned a job class rating, ranging from job class 1 to job class 27, which determines the average hourly wage rate for the job. For example, under the August 1, 1974 collective bargaining agreement, employees in job class 1 received a base wage rate of $4.305 per hour, while those holding job class 27 jobs received $6.805 per hour.

18. In accordance with the collective bargaining agreements, jobs rated at job class 5 and above, and one-third of the jobs rated in job class 4, are formally divided into job groups known as seniority subdivisions. As of July 14, 1973, there were 68 seniority subdivisions at Lukens.

19. All jobs rated at job classes 1, 2 and 3, and two-thirds of the jobs rated at job class 4, are not included within any seniority subdivision, but are part of one large job group known as the "pool". Since 1965, the pool jobs have been divided among seven "area pools," each of which relates to a group of seniority subdivisions. There are, however, some seniority subdivisions which have no related "area pool".

20. Lukens' hourly employees accumulate two kinds of seniority. "Company seniority" is based upon length of service as an employee of Lukens; "subdivision seniority" is measured by the duration of employment within a particular subdivision. Employees holding "pool" jobs do not accumulate any subdivisional seniority.

21. If an employee leaves a subdivision (for example, by way of layoff or voluntary transfer) and begins work in another subdivision, he continues to maintain the subdivisional seniority he had accumulated in his former unit. From the date he begins working in his new unit,

however, he begins to accumulate subdivisional seniority only in that unit. Thus, an employee cannot accumulate subdivisional seniority in more than one subdivision at a time.

22. When a job vacancy occurs within a seniority subdivison, qualified employees actually holding jobs within that unit have the first preference to fill the vacancy, in order of their respective subdivisional seniority. The company is not required to provide formal notice of a job vacancy to employees within the unit where the vacancy occurs, and the practice of providing such notice differs from unit-to-unit, but in fact such notice is usually provided, in one form or another.

23. If no employee actually working in a seniority subdivision seeks to fill a job vacancy occurring in that unit, employees who have previously been laid off from that subdivision are recalled on the basis of subdivisional seniority. Thus, employees retain "recall rights" to jobs in units from which they have been laid off or have transferred, but they may only exercise such rights if no employee actually working in that unit desires to fill the vacancy.

24. If a job vacancy cannot be filled from among employees actually working in the unit, or from employees exercising recall rights to the unit, employees working anywhere in the plant may transfer to the vacant position; assuming ability and physical fitness are relatively equal, company seniority governs the selection.

25. Before August 1, 1971, there was no plant-wide posting or any other formal notice of job vacancies not filled from within the unit or by the exercise of recall rights. Employees interested in transferring to a different subdivision were permitted to file with the Employment Department forms, known as "request for transfer" forms, on which they designated their job preference. Vacancies which could not be filled from within

the unit or through recall rights were supposed to be filled by the employment office by selecting the qualified employee with the most company seniority who had a request for transfer form to that unit on file.

26. Since August 1971, the collective bargaining agreements have required that notices of job vacancies which could not be filled from within the unit or through recall rights were to be posted at the various clock stations throughout the plant. Employees desiring to apply for the vacancy sign their names on a list maintained by the Employment Department. If they sign the list within the time period specified in the notice, they are entitled to consideration on the basis of their company seniority. If they sign up after the deadline (below the "red line"), they are eligible for consideration on the basis of their company seniority, but only if the vacancy cannot be filled from among those whose applications were timely.

27. Under the various collective bargaining agreements, seniority (whether company or subdivisional) is the deciding factor in determining who receives a vacant job only when ability and physical fitness are relatively equal. Both before and after June 14, 1967, the company has used a variety of tests to determine eligibility for various hourly jobs, and has also based eligilibity on an employee's disciplinary record with the company, and his supervisory evaluations.

28. Layoffs within a seniority subdivision are governed by subdivisional seniority, the least senior employee being laid off first. If an employee is laid off from one seniority subdivision but has previously worked in another subdivision, he may "bump" any employee in the other subdivision who has less subdivisional seniority in that unit. If an employee laid off from a subdivision is unable to "bump" into another subdivision, he may replace any employee holding a pool job who has less company seniority.

29. The foregoing procedures concerning transfers, promotions and layoffs have been in effect since the early 1940s, except that the rules governing "pool" jobs were instituted in 1962, and the rules governing plant-wide posting of job vacancies were instituted in August 1971.

B. *Salaried Work Force*

30. The salaried employees at Lukens range from operating management and professional personnel to plant guards and janitors.

31. Managerial positions are arranged in the following hierarchy of jobs, from the highest level to the lowest:

Officers (approximately 11 to 13)

Managers (approximately 23 to 26)

Superintendents (approximately 30)

Supervisors (approximately 40)

General foremen (approximately 60)

Foremen (approximately 300)

32. The first step in filling a salaried vacancy is the issuance of a requisition by supervisory personnel in the area where the vacancy exists. This requisition must then be approved by the Lukens' Salary Committee. If approved, the requisition is next sent to Employment Department personnel, who attempt to find a candidate to fill the vacancy, although the supervisory employees in the area where the vacancy exists may suggest a candidate or candidates. No formal notice of salaried job vacancies is given to Lukens' employees.

33. The Employment Department has used a variety of tests in selecting eligible candidates for salaried jobs, and also considers such matters as work experience, skill and knowledge, education, personality, temperament, and company service. There are no written guidelines. In

all instances, the ultimate selection of a candidate to fill the vacancy rests within the discretion of supervisory personnel in the area where the vacancy occurs. The process of filling salaried vacancies has remained essentially the same since at least 1954.

III-A. INTRODUCTION TO FINDINGS ON THE MERITS

It is of particular importance in this case, in assessing the implications of the statistical and other "pattern or practice" evidence, to bear in mind the particular characteristics of the Lukens operation. The specialty steel industry involves the application of skills which are unique to the specialized manufacturing process in question. This is not a situation in which trade or craft skills found in the general work force, or acquired in other types of industry, are readily adaptable to Lukens' needs (with certain limited exceptions, such as welding, truck-driving, and some rough carpentry). The vast majority of the Lukens hourly work force start from scratch, and are trained on the job. Indeed, Lukens has always prided itself upon its general policy of promoting from within.

By the same token, since most hourly employees commence their service with the company at the bottom of a career ladder, as laborers of some kind, there are no threshold educational or experiential requirements: physical health and amenability to training are the essential qualifications.

As an abstract proposition, therefore, it would be permissible to conclude that, if there is not and never has been racial discrimination at Lukens, there should be no substantial disparity between black and white employees in terms of job classifications, base wages, earnings and working conditions. That is, while the abilities, interests and motivations of individual employees undoubtedly

differ, there is no reason to assume that such differences significantly favor either racial group.

There are, however, very substantial disparities between black and white employees of Lukens, in each of the various matters mentioned above. Moreover, it is abundantly clear that, in the past, blacks at Lukens (as, unfortunately, in many other industrial establishments) were discriminated against. They were permitted to work only in certain operating units (performing the least desirable kinds of work, generally speaking); had fewer opportunities for advancement, and therefore tended to be clustered in the lower job classifications; and were more likely to suffer disciplinary sanctions. In addition, they were exposed to a wide range of racial harassments. Locker rooms and rest rooms were segregated; racial animosity was openly expressed, orally, in writing, and by deed; and they were in general treated as second-class citizens. Throughout the 1930s, '40s and '50s and beyond, the personnel records maintained by Lukens for each employee contained a space for "nationality"; white employees were listed as "American," black employees were listed as "colored" or "Negro". In 1969, responsible Lukens officials issued orders for the correction of all personnel records by eliminating the offensive "nationality" designations; in a great many instances, this was accomplished merely by writing out the words "colored" or "Negro" with the result that, whereas white employees are listed as "American," many black employees are not accorded that designation.

In short, it is obvious from the evidence that, throughout the limitations period, any statistical racial analysis of the Lukens work force would be skewed because of earlier discrimination. That fact has placed each of the parties in a somewhat anomalous position. On the issue of intentional discrimination under § 1981, and on the bona fides of the seniority system under Title VII, it is to plaintiffs' advantage to emphasize the pre-limitations

discrimination, both for the purpose of showing that discriminatory animus tainted the establishment of the seniority system, and for the purpose of showing that discriminatory animus carried over into the limitations period. But that same evidence renders plaintiffs' statistical proofs applicable to the limitations periods much more difficult, since it tends to provide a non-actionable explanation for many of the observed disparities. Needless to say, Lukens' problem is the mirror-image of plaintiffs': explaining present-day disparities as attributable to past discriminatory practices tends to undermine the company's § 1981 and seniority defenses. The union defendants, also, have been placed in the somewhat ambivalent position of minimizing the extent of earlier discrimination so as to bolster their contention that the seniority system was and is bona fide; for the most part, supporting the employer in its defense against claims being asserted by the unions' own members; and, at the same time, maintaining that all claims of racial discrimination were recognized and vigorously pursued.

Thus, it is not surprising that the evidentiary record as a whole reflects a good deal of legal tightrope-walking by all parties, and some seeming internal inconsistencies in their respective positions. The question before the Court, however, is not whether one party or the other achieved a greater degree of success in solving its tactical and strategic problems, but what factual conclusions are correctly to be drawn from the mass of evidence presented.

In the following Findings of Fact addressing the merits of the various discrimination claims, matters as to which plaintiffs' proofs clearly fail to make out a prima facie case, and matters as to which there can be no substantial disagreement, will be set forth in summary form, without elaboration. As appropriate, particular findings or groups of findings will be accompanied by a discussion of the pertinent evidence, and the court's reasoning.

IV. THE BONA FIDE NATURE OF THE SENIORITY SYSTEM

34. The seniority system embodied in the series of collective bargaining agreements governing the relationships between Lukens and its employees since 1937 have had, and continue to have, the inevitable effect of perpetuating disparities and disadvantages associated with race.

35. When the seniority system was established, blacks at Lukens were being, and had been for many years, discriminated against. In comparison to white employees, blacks occupied the lowest-paying jobs, were segregated into specific units, did not have equal access to promotional and transfer opportunities, etc.

36. Both the unions and the company were fully aware of the discriminatory practices and disparate status based on race. And both the unions and the company were aware that the seniority provisions of the initial and subsequent collective bargaining agreements would tend to stabilize and perpetuate the existing racial disparities.

37. In instituting the seniority system, however, neither the unions nor the company was motivated by racial considerations. The system of unit-seniority was adopted because it represented standard practice throughout the steel industry, and was assumed to be best suited to operating efficiency. From the standpoint of the unions, the crucial first step and transcendent goal was to organize the workers and achieve recognition, and it was important to establish that this goal could be achieved with minimal alteration of the status quo. The company, too, sought to minimize change.

38. The 1962 modification of the seniority system through the establishment of the "pool" arrangement was not racially motivated. Moreover, the change did not disadvantage black employees; and blacks actively participated in the negotiations which led to the modification.

39. Pursuant to a 1974 Consent Decree in litigation brought by the Justice Department to remedy perceived racial discrimination in the steel industry, the major steel producers were required to, and did, implement plant-wide seniority. Although the labor negotiations of these major steel producers have been, and are, generally relied upon as establishing the pattern for the entire industry, no such change was implemented at Lukens. The International Union, while it announced the contents and ramifications of the Consent Decree in union publications available to the membership at large, made no concerted effort to discuss the Decree with the leaders of the local unions at Lukens, nor did it urge that plant-wide seniority should be adopted at Lukens pursuant to "pattern-bargaining". The company was not a defendant in the government litigation, and, so far as the record discloses, more or less ignored the implications of the Consent Decree.

It would be permissible to draw the inference that neither the company nor the local unions at Lukens were sympathetic to the Consent Decree or to the 'governmental interference' which produced it. But whether the bargainers at Lukens be deemed enlightened or benighted, the evidence as a whole makes it clear beyond dispute (a) that a shift to company-wide or plant-wide seniority would be as likely to disadvantage blacks as to improve their lot; (b) among all Lukens employees, black and white alike, there is and has always been an overwhelming preference for the present seniority system, over a plant-wide system; (c) blacks participated actively in the negotiations leading to each of the pertinent collective bargaining agreements, and never suggested any such change in the seniority system; and (d) among the 50 or so witnesses who testified for the plaintiffs in this case, not one expressed any complaint about the seniority system.

40. Even if the seniority system at Lukens had been established for the express purpose of perpetuating racial disparities (which, as noted above, is not the case), a shift to plant-wide or some other seniority system would be unlikely to provide any net benefit to black employees, now or in the future.

V. RACIAL DISPARITIES ATTRIBUTABLE TO IMPACTS OF THE SENIORITY SYSTEM, AND THEREFORE NOT ACTIONABLE

41. The evidence establishes the following facts, but, because attributable to the impacts of a bona fide seniority system, these facts provide no basis for relief in this case, and the evidence in support of these facts has little or no probative value in this case:

(a) that white employees as a group receive higher hourly adjusted base wages than comparable black employees;

(b) that white employees receive higher overall annual earnings than comparable black employees;

(c) that white employees are in higher job classes than black employees of equal company service (both treating the hourly work force as a whole, and also treating craft and non-craft employees as separate groups);

(d) that white employees hold a disproportionately high percentage of craft jobs, compared to their representation in the non-craft hourly work force.

Plaintiffs have presented other evidence pertaining to racial disparities, unrelated to seniority and not shown to have been affected by the seniority system, which must now be considered.

VI. INITIAL JOB ASSIGNMENTS DURING THE LIMITATIONS PERIOD

A. *The Job-Class of Initial Positions*

42. White employees hired between January 1, 1972 and February 7, 1977, into non-craft jobs were initially assigned to positions with an average job class of 4.9. During the same period, blacks hired into non-craft jobs were initially assigned to positions with an average job class of 4.42. This difference of almost one-half a job class is statistically significant at the .01 level (more than five standard deviations from the result which would be expected in the absence of racial impact).

43. Hiring at Lukens is conducted on a weekly basis, and the choice of initial assignment necessarily reflects the particular openings available in a given week.

44. During the same January 1, 1972 to February 2, 1977 period, treating each week's hires separately, it appears that the median job class in most weeks was class 5. Indeed, during the entire period, more than half of white non-pool hires, and almost 70% of black non-pool hires, were assigned to positions in job class 5. The likelihood of a black new hire achieving initial placement above job class 5 was much less than the likelihood of a white hire obtaining such a placement (more than six standard deviations less likely, a difference which is statistically significant to a high degree). (Lukens' table L-27.)

45. Another study, covering the years 1973-77 establishes that the initial placements of non-craft new hires into job classes, on average, was 5.0 for white males, 4.8 for white females, 4.7 for black males, and 4.2 for black females.

46. Reverting to table L-27, covering the period January 1, 1972 through February 2, 1977, it appears that there were 25 weeks in which the median job class of

new hires was higher than class 5. More whites than blacks were hired in 18 of those weeks (72%).

B. *Initial Assignments to the Pool Versus Initial Assignments to Seniority Subdivisions*

47. There are three potential advantages which tend to make initial assignment to a seniority subdivision preferable to initial assignment to the pool:

(a) First, an employee initially assigned to a seniority subdivision begins to accumulate seniority in that subdivision, as well as company seniority. So long as he remains in that subdivision, he will always have rights to jobs in that subdivision which will be superior to the rights of other persons hired the same day but initially assigned to the pool. If he later transfers out of that subdivision, his accumulated seniority may enable him to bump back into that subdivision in the event of a layoff in his second subdivision. Thus, an employee initially assigned to a seniority subdivision gains added protection against layoffs.

(b) Second, in the event of layoff, a pool employee's job rights are subordinate to those of every hourly employee with an earlier company service date. The job-rights of an employee in a seniority subdivision, however, are junior only to persons having more seniority in that subdivision. Thus, if a layoff does not hit that particular subdivision, the subdivision employees will continue to work even though other employees with greater company seniority are being laid off.

(c) Third, an employee in a seniority subdivision enjoys greater stability and certainty in work-assignment. Pool employees, on the other hand, are subject to being transferred from job to job on a daily, or even hourly, basis.

48. During the period January 1, 1972 through February 2, 1977, of persons described as "new hires" in

Lukens' transaction reports, black employees had a 23.5% greater likelihood than whites of being assigned initially to the pool. 31.8% of black new hires were assigned to pool positions, compared to 24.2% of white new hires. This disparity is statistically significant to a high degree (at the .01 level).

Apparently, Lukens' records list as "new hires" many persons who were employed at Lukens previously, and are being re-hired; and Lukens contends that it is reasonable to assume that a person being re-hired is likely to be assigned to the same type of job previously held. I have some difficulty appreciating the significance of this argument, at least in the absence of a showing that such transactions affecting blacks were recorded or labeled differently from similar transactions involving whites; or that blacks are more likely to be re-hired than are whites. Moreover, there is reason to doubt the initial premise, namely, that jobs assignment on re-hire is likely to be similar to the job assignment on initial hire. A study by plaintiffs' statistical expert demonstrates that there is no correlation between the job assignment on initial hiring and the job assignment on most recent re-hire. (N.T. 31.86-87; U-461.)

Be that as it may, elimination of all "new hire" transactions which Lukens contends are repetitious (approximately 27% of the total "new hire" transactions reflected in Lukens' records) merely reduces the disparity between races, but does not neutralize it.

49. Considering only the "new hires" asserted by Lukens to be genuine "new hires," 26.3% of blacks were assigned to pool jobs, as compared with 21.6% of whites. This disparity is statistically significant (at the .02 level).

50. Analyzing repeat-hires separately produces the following: Of "second" hires, 44.3% of blacks and 30.3% of whites were assigned to pool positions. Of all

repeat hires, 46.8% of blacks and 31.1% of whites were assigned to pool positions.

On their face, these percentages show statistically significant disparities to a high degree (at the .01 level). As independent evidence of discrimination, however, the importance of these "re-hire" figures is relatively slight. Employees in pool jobs are more likely to be laid off than employees in seniority units, hence (probably) more likely to experience repeated hirings. Blacks have always been over-represented in the pool. The "pool" jobs are those at the lowest end of the ladder. Abstenteeism, voluntary quits, and adverse disciplinary actions—all of which tend to burden blacks more than whites, as will be discussed later—may contribute to the "re-hire" assignment disparities.

51. There is no statistically significant racial disparity in pool versus non-pool assignments among "new hires" for the 1969-1970 period (Lukens' table L-75). When all "new hires" regarded by Lukens as genuinely "new" hires, for the entire period from 1969 through 1977 are studied (*i.e.*, combining the data in Lukens' table L-75 with the data in Lukens' table L-76), it appears that 30.9% of blacks were assigned to pool positions (200 of a total of 646) while only 26% of whites were assigned to pool positions (355 of a total of 1,336). These disparities are statistically significant (below the .05 level).

52. Lukens contends, *inter alia*, that the foregoing statistics are irrelevant, and that the only relevant statistics are those which analyze the hiring process week-by-week. It is true that, in weeks during which both blacks and whites were hired, and one or more new hires were assigned to the pool, there was no significant racial disparity in pool assignment. I find this argument unpersuasive.

While Lukens does hire on a weekly cycle, and the initial job assignments reflect the kinds of openings avail-

able in a particular week, I am persuaded that the overall statistics provide a more reliable racial comparison than do the weekly statistics. Just which positions will be filled, and when, is entirely within the control of the company. Although theoretically job applications are kept on file in the employment office in chronological order so that applicants can be interviewed in chronological order for available openings, this is not a rigid rule, and is commonly departed from. The entire process, of deciding when various positions are to be filled, and who will fill them, involves many subjective judgments by managerial personnel.

Analysis of the overall statistics shows that blacks, to a statistically significant degree, are more likely than whites to be newly hired and initially placed in weeks in which large numbers are assigned to pool openings. The probability of this occurring by chance are about 3 in 10,000, more than 3 standard deviations (P-1390; N.T. 30.98-100).

There are, to be sure, data tending to negative discrimination in initial job assignments. Defendants properly point out that, in weeks in which no pool jobs were filled, a higher percentage of blacks than whites were hired; and that in weeks where no blacks were hired, a greater percentage of pool positions were filled than in weeks in which blacks were hired. (Lukens' Exhibits L-1901B and 1902A.) In my view, however, the overall statistics carry greater weight. Analysis of each hiring week separately is suspect because of the smaller numbers involved; such minute analyses may often be meaningless. Moreover, plaintiffs are not required to prove that discrimination occurred every week, or that the employer invariably discriminated.

53. Lukens has also attempted to refute the foregoing statistics on the theory that gender differences (not actionable here) rather than racial differences, are reflected

in the data. Lukens personnel involved in the hiring process testified that, based on their observations, women seeking employment at Lukens tend to prefer pool assignments, because such jobs are less demanding, tend to fit in better with the flexible schedules desired by housewives with families to care for, and are better suited to the needs of persons whose primary careers are in the home.

One such witness was George P. Kissell, Jr. However, during the time he was in charge of the placement of hourly employees (February 1974 through July 1976) a higher percentage of male applicants were assigned to pool positions (19.1% of male new hires) than female (18.7% of female new hires) (L-25, 26). No detailed statistics were presented covering the period when Trinka Fleming, the other witness who noted the alleged preference of females for pool assignments, was in charge of the process. During the entire period of Kissell's and Fleming's tenure, only 43 females were newly hired to non-craft positions.

During the period from July 19, 1973 through February 23, 1974, according to an internal report prepared by Lukens' record administrator, Carl Welsh, among female "new hires" 48% of the blacks were assigned to pool positions, as compared with only 27% of the whites.

At trial, Lukens presented other statistics (allegedly reflecting elimination of repeat hires), showing that, among female new hires, 39% of the blacks were assigned to pool positions, as compared with 24% of the whites.

Even assuming (contrary to the plain implications of Lukens' record) that the alleged preference among women for pool assignments did exist, it does not explain the racial disparities, either in the aggregate, or among male new hires, or among female new hires. That is, there is no suggestion that the alleged preference for pool jobs

was more prevalent among black females than white females.

C. *Access to Better-Paying Hourly (Craft) Positions*

54. As noted above, blacks are significantly underrepresented in craft jobs at Lukens. But since this is, in substantial part at least, attributable to pre-limitations activity and the impact of the bona fide seniority system, the gross statistics (percentages in various categories, wage and earnings levels, etc.) are not particularly helpful. There is, however, other evidence which bears directly on the issue of whether or not, during the limitations period, blacks were discriminated against in respect of the accessibility of craft jobs.

55. Of the employees first hired at Lukens, into non-craft positions, between January 1, 1972 and February 2, 1977, 4.8% of the black hires had been promoted into craft positions by February 2, 1977, whereas 14.9% of the white new hires had been promoted to craft positions within that period. Thus, whites employed during that period were more than three times as likely as blacks to be promoted into craft positions.

56. During the same period, 34.4% of all "new hires" were black, whereas only 14.5% of those new hires who were promoted to craft positions were black (this represents about 6.62 standard deviations from the random).

57. The foregoing findings are applicable, whether "craft positions" are defined pursuant to the pre-1971 "industry" definition, or the post-1971 "EEO" definition.

58. As demonstrated in P-501, p. 2, P-502, table 3, and as testified (N.T. 4.12-14), although company seniority has a bearing on eligibility for promotion to craft positions, seniority does not account for the disparities mentioned above. A comparison of all hourly employees actively employed at Lukens as of February 2, 1977, by year of hire, shows that, in 33 of the 34 years studied,

blacks hired during that year were, to a statistically significant degree, less likely to have achieved craft status by February 2, 1977 than their white counterparts. Indeed, the defendants concede that the racial disparities in craft positions are not accounted for by seniority.

59. Since 1962, the collective bargaining agreements have mandated that, where ability and physical fitness are substantially equal, transfers to better jobs are governed entirely by company seniority. However, the "request for transfer" system which was in operation until August 1971, and, to a lesser extent, the "posting" system which has pertained since that date, were susceptible to abuse on racial grounds. As noted previously, until the 1971 job-posting program was instituted, the existence of openings in craft positions was likely to become known only to a few persons, who could then selectively impart that information to their friends and relatives. While precise statistical or documentary evidence is not available on this subject, the evidence as a whole leaves little doubt that, before August 1971, blacks were much less likely to learn of the availability of craft openings than their white counterparts.

Moreover, actual approval of job-transfer requests involved a great many subjective judgments on the part of supervisors. Until 1971, the supervisor of the subdivision into which transfer was sought had absolute and unfettered discretion to approve or reject a transfer application. Until August 1971, a transfer request could, and usually was, "voided" in the employment office (*i.e.*, was not even submitted to the supervisor of the subdivision in question) if the employee seeking transfer had not maintained a "clean" disciplinary record for the previous three years. Abstenteeism, as such, was disregarded, unless the employee had been disciplined for absenteeism. As discussed below, blacks were much more likely to be disciplined for absenteeism (and in general) than their white counterparts.

60. At least during the pre-limitations period, there were numerous instances in which transfer requests were denied expressly because of racial considerations. There is no evidence of any specific instances of overt racial discrimination in the transfer process during the Title VII limitations period, and only a few such instances during the § 1981 limitations period were testified to (these will be considered in connection with the individual claims of named or intervening plaintiffs).

On the other hand, some of the same individuals who had been guilty of overt discrimination during the pre-limitations period continued to have and exercise decision-making authority during the limitations period. That fact, coupled with Lukens' unremitting contention that there has never been any racial discrimination at Lukens, lends some support to the inference that the job-transfer system may have been manipulated, during the limitations period, to achieve racial discrimination in access to craft positions.

D. *Manning New Facilities; Strand-Casting*

61. In 1969, Lukens decided to construct a Strand-Cast facility. Strand-casting was then a relatively new process, in which molten metal is poured directly into a cast slab (rather than into molded ingots which are thereafter converted into slabs). It was contemplated that this new process would largely replace the work then being performed in the open hearth pits, hot top, and conditioning steel yard subdivisions.

62. The applicable collective bargaining agreements provided that employees displaced from "any facility being replaced" by a new facility were to be given preference for entry into the new facility, in the order of their company seniority (union Exhibit U-481A).

63. The subdivisions most directly and drastically affected by the introduction of the strand-casting process

were the pits, hot top, and conditioning steel yards. Seventy-percent of the hourly employees in those subdivisions were black. Plaintiffs contend that employees in those units should have been given precedence in manning the new facility and that, if this course had been followed, the new strand-casting seniority unit should have been approximately 70% black.

The company, however, determined that several other seniority subdivisions would have their manpower requirements reduced as a result of the new facility. These included the melting floor, cranes, 140/206 heating, 206 rolling, 206 floor and stock yard units; membership in most of these units was predominately white. Accordingly, the company interpreted the collective bargaining agreement as requiring it to accord priority to employees in all of the units mentioned above, in the staffing of the new Strand-Casting Unit.

There were 720 employees potentially eligible for assignment to the new Strand-Cast Unit, as determined pursuant to the company's interpretation of the collective bargaining agreement. Of these, 106 completed the application process. Thirty-one were ultimately selected; of these, 14 (47%) were black. Eight of the 14 blacks selected (60%) came from units other than pits, hot top and steel yards (Lukens Exhs. L-955, L-956).

64. While there is much force to plaintiffs' argument that, since the disproportionately black units were most drastically and directly affected by the implementation of the new manufacturing process, employees in those units were entitled to the lion's share of the new jobs in Strand-Casting, the company's interpretation of the collective bargaining agreement is not manifestly unreasonable.

Because of the newness of the strand-casting method, the high cost of the equipment used in that process, and the potentially disastrous effects of employee error in conducting the operations, Lukens was understandably inter-

ested, to an unusual degree, in assigning the best-qualified persons to the new unit. While I recognize the distinct possibility that the decision-makers may have been influenced by racial stereotyping, unconsciously or otherwise, in deciding to open the application process to units less directly affected by the new facility, and while that possibility is obviously a disturbing one, I am unable to conclude that the evidence preponderates in favor of a finding of racial animus in this situation. That a genuine business judgment was made cannot be doubted; and, while this business judgment may have been clouded by racial preconceptions, I cannot find, from the evidence, that this is more likely true than not. It must be remembered that 47% of the persons assigned to the new unit were black, and that more than half of those blacks came from units which, according to plaintiffs' argument, were improperly included in the opportunity because predominately white.

65. Persons assigned to the Strand-Cast Unit were selected on the basis of company seniority and their ratings by supervisors, on a form known as the Personnel Description Check List ("PDCL"). The PDCL ratings were entirely subjective; most of the raters were white; and, when studied later (in 1972), the PDCL proved to have had a statistically significant adverse impact upon blacks.

66. Named plaintiff Ramon Middleton was initially rejected for the Strand-Cast Unit, solely because of his PDCL rating, which had been performed by a supervisor named Matthews. According to Matthews, who is white, only two persons evaluated by him were given unsatisfactory ratings on the PDCL; they were Middleton, who is black, and George Eachus, who is white. This testimony lends significant support to plaintiffs' contention that Middleton was discriminated against. The employment records of the two men show that Middleton's disciplinary record, over a 14-year period, consisted of 2

warnings, the most recent of which occurred in 1967. Eachus, on the other hand, had been twice suspended and had received four warnings, all between December 1969 and April 1971 (Exh. P-1421).

67. Four of the selected employees began training for the Strand-Cast Unit on July 20, 1970, 12 more began training on August 3, 1970, and eight more were added to the training program as of January 4, 1971. Middleton was less senior than the selectees in the first two groups, but the group which began training in January 1971 included two employees who had less company seniority than Middleton. It was then that Middleton learned, for the first time, that he had been rejected.

As a result of Middleton's protest, the union filed a grievance on behalf of Middleton and other rejected applicants, challenging the procedures for selection, including specifically the PDCL. Eventually the company and the union, with the approval of the affected employees, worked out a compromise solution pursuant to which specified employees, including Middleton, were to be given "special consideration" for assignment to the Strand-Cast Unit. This arrangement was agreed upon as of February 3, 1971. On March 9, 1971, with the cooperation of the union representative, Middleton filed a complaint against the company with the Pennsylvania Human Relations Commission.

On April 5, 1971, eight additional employees were added to the Strand-Cast Unit, Middleton among them.

The net result of this series of events is that Ramon Middleton, by virtue of a foreman's evaluation which probably was tainted by racial bias, was not assigned to the Strand-Cast Unit as early as he should have been. He is, I believe, entitled to adjustment of his seniority in that unit.

68. The most important job in the Strand-Cast Unit —indeed, it is the highest hourly job in the entire plant—

is that of "No. 1 operator". The company decided that persons to be trained for the "No. 1 operator" position should, as a prerequisite, have at least two years "hot metal" experience, and specified the various jobs throughout the plant which, in the company's view, provided such experience. The "hot metal" requirement, as thus limited, excluded a disproportionately high number of blacks from consideration for the No. 1 operator job.

In retrospect, it seems quite probable that experience in several other jobs, in addition to those specified by Lukens, would have rendered an employee fully as well qualified for the No. 1 operator job as the experience mandated by Lukens, but that is not a judgment for this court, or the plaintiffs, to make. There can be no doubt that, in establishing these criteria, Lukens' officials were making honest business judgments. I am satisfied that racial considerations did not enter into the selection of these criteria.

At any rate, it is conceded that, if the "hot metals" experience requirement had been deleted, and the selections based entirely upon seniority, the four positions would have gone to whites anyway.

By the time of trial, one of the four top jobs in the Strand-Cast Subdivision was held by a black, and other blacks were being trained for the position. Viewed in its entirety, the evidence does not establish that there was racial discrimination in promotions to the "No. 1 operator" positions.

E. *Lukens' Explanation and Refutation; Superior Qualifications and personal choice*

69. As noted above, most craft positions at Lukens involve skills which must be learned during employment at Lukens. With limited exceptions, the principal requirements for promotion to a craft job are: physical ability to handle the job, amenability to instruction, and a de-

sire to attain that position. Given those pre-requisites, company seniority is determinative.

70. Lukens challenges the probative force the statistical disparities discussed above on the ground that the statistical evidence does not address two important factors: personal choice, and relative qualifications.

71. While there may be, and undoubtedly are, isolated instances in which an eligible employee chooses to reject an offered promotion, or chooses not to apply for a better job, for personal reasons, there is no evidence, and I am unwilling to assume, that blacks are less interested in advancement than their white counterparts. It is, I believe, a safe generalization that most persons are interested in advancing their own economic welfare whenever the opportunity presents itself. I therefore reject the suggestion that personal choice contributes significantly to an explanation of the racial disparities disclosed by the statistical evidence. Moreover, it should be noted that if one were to conclude that a significantly greater percentage of blacks than whites choose not to improve their lot and that this phenomenon occurred on a sufficient scale to affect the interpretation of the statistical evidence, one might well then be faced with addressing the possible causes of such a phenomenon. If, for example, blacks tended to refuse promotion because of a sense, derived from the atmosphere of the work place, that they would not be welcome in the new position, or would be expected to "prove themselves" and overcome skepticism, or would thus become vulnerable to additional forms of discrimination, the alleged personal choice phenomenon would scarcely constitute a valid explanation of the statistical evidence.

72. There is no evidence that, among persons initially hired at Lukens, blacks as a group were less qualified than whites for advancement to craft positions or to salaried positions.

73. To the extent that Lukens relies upon evidence concerning the under-representation of blacks among skilled craftsmen in the local outside labor market, the reliance is misplaced. Lukens was hiring persons capable of developing required skills, not persons who already possessed such skills. There is no evidence that, among persons actually hired at Lukens, whites tended to possess relevant skills to a greater degree than blacks.

74. The evidence concerning employee-testing programs at Lukens, detailed below, strongly supports plaintiffs' claims of discriminatory treatment.

(a) Until at least 1971, Lukens relied heavily upon the Wonderlic Test as a device for determining eligibility for advancement to craft positions, and to higher job classifications. In order to be eligible for advancement to a craft job, an employee was required to achieve a certain grade on the Wonderlic Test. In general, higher scores were required for each advancement to a higher job classification.

(b) It has been generally known since the late 1940s, and was in fact known to the pertinent officials at Lukens, that the Wonderlic Test is a measure of formal education, rather than of intelligence.

(c) As early as 1952, Lukens officials were aware, not only that the Wonderlic Test tended to measure formal education rather than intelligence, but also that the test was not job-related; indeed, that there tended to be a negative correlation between scores on the Wonderlic Test and actual job performance, as measured by supervisors' ratings (Ex. P-8).

(d) In 1964, a Lukens official, James Hall, conducted a study to determine whether there was any relationship between Wonderlic Test scores and job-performance in the Lukens crane-operator training program. The study demonstrated that the Wonderlic Test was useless as a predictor of success as a crane-operator. The study even

produced some evidence of an inverse relationship between test scores and job performance.

(e) On October 16, 1967, an employee of the Lukens Employment Department sent a memorandum to James Hall advising that, pursuant to federal and state testing guidelines, it was necessary that each item on the Wonderlic Test be compared to specific job content. No action was taken in response.

(f) The same memorandum also suggested the desirability of a validation study of the Wonderlic cutoff scores. So far as the record discloses, no such study was made.

(g) In 1968, Mr. Hall, because of his realization that the Wonderlic Test tended to have an adverse impact upon minority employees, directed that a study be conducted in an attempt to measure the relationship between Wonderlic scores and five selected criteria of successful job performance. The study was completed in August 1968, and established that the Wonderlic was "extremely poor" in predicting job performance (Exs. P-27, 28).

(h) At least by June 1967, it was generally known among Lukens officials that the Wonderlic Test had an adverse impact upon blacks, and that its use was a major reason for the observed concentration of blacks in the lower job classifications at Lukens.

(i) Some Lukens witnesses testified that Lukens stopped using the Wonderlic Test as a screening device at or about the time the Supreme Court rendered its decision in *Griggs v. Duke Power Co.*, in March 1971. However, other Lukens witnesses testified that the abandonment of the Wonderlic Test for screening purposes occurred at the same time with respect to all positions, and it appears that the Wonderlic Test was being used for screening applicants for the position of foreman as late as July 1974. No written directive concerning

abandonment of the Wonderlic device appears ever to have been issued.

(j) In July 1971, a directive was issued (by Mr. Domangue) to the effect that all tests currently in use at Lukens would continue to be used until a superior substitute had been developed, validated and instituted. To date, no testing procedure or screening device employed by Lukens has been validated.

(k) Some Lukens witnesses testified that, at some point between 1968 and 1971, Lukens began using the SRA Non-Verbal Test in place of the Wonderlic, on the theory that this would overcome the racially disparate impact of the Wonderlic test. However, the Lukens employees who actually administered such tests testified that the SRA Non-Verbal Test was rarely used, and that its use decreased between 1968 and 1971.

(*l*) Although Lukens stopped administering the Wonderlic Test (probably some time in 1971), Wonderlic Test scores continued to be shown under "qualifications" on job transfer forms after that date.

(m) In 1972, Lukens developed a test known as the "Shop Math Test" which it required for entry into electrical craft positions. By 1974, the Shop Math Test was also required for entry into the Mechanical Maintenance Subdivision, and at some point thereafter it became a requirement for entry into virtually all of Lukens' trade and craft subdivisions (P-43, P-49).

(n) The Shop Math Test was frequently revised, and it is impossible to determine which version may have been employed at particular times.

(*o*) Lukens presented data suggesting that, between 1974 and September 22, 1978, the Shop Math Test was administered to 479 white employees and 93 minority employees. Sixty percent of the whites passed, compared with twenty-nine percent of the blacks. These figures

lead inescapably to the conclusion that the Shop Math Test was a substantial factor in producing the racially disparate rate of transfers from non-craft to craft jobs discussed above.

(p) Neither the Shop Math Test, nor any other screening device employed at any time at Lukens, has ever been validated as job-related. As is demonstrated by a series of internal memoranda from 1968 through 1979, responsible officials at Lukens were well aware that the various testing and screening devices had a disparate impact upon blacks, that they had not been validated as job-related, and that, in the absence of validation, their continued use was highly questionable.

(q) At the time of trial, Lukens purportedly was engaged in an attempt to validate the Shop Math Test, for content-validity.

(r) Throughout the period when the Wonderlic Test was in widespread use at Lukens, Lukens officials constantly defended the practice as being validly job-related, despite the fact that their own studies had shown the contrary. In the course of collective bargaining negotiations in 1968, when the union challenged the continued use of the Wonderlic Test, company representatives dismissed the challenge as being asserted merely on behalf of "minorities".

(s) Lukens did not preserve records of tests administered, or test scores in any systematic way. There is therefore no adequate basis for statistical studies demonstrating that particular tests did adversely affect racial minorities. On the other hand, it is reasonably clear that the Lukens personnel administering the Shop Math Test believed, on the basis of their observations, that the Shop Math Test did adversely affect minorities.

75. There is no evidence to suggest that there was any dissimilarity between the tests required of white applicants and the tests required of black applicants for promotion/transfer.

F. *Shift Assignments, Incentive Bonuses, Overtime Pay*

76. Plaintiffs presented a great deal of anecdotal evidence tending to show that many foremen and supervisors discriminate between races in assignments to particular work, overtime work, less desirable shifts, etc. There can be no doubt that many individual instances of discriminatory treatment have been shown. Considered as a whole, however, the evidence in this case is inconclusive with respect to plaintiffs' assertions that, customarily and on a class-wide basis, blacks were discriminated against with respect to shift assignments, Sunday work, and overtime pay. The statistical evidence tends to show that, on average, blacks at Lukens receive more overtime pay and incentive bonus compensation than their white counterparts. This may well be due to the fact (as asserted by plaintiffs) that blacks are more likely to be assigned to work on Sundays than are whites. Plaintiffs may be correct in arguing that most employees would prefer not to work on Sundays, hence assignment to Sunday work is a disadvantage. On the other hand, the defendants may well be correct in arguing that Sunday work, which produces higher pay than work during the week, is a much-desired benefit. The record provides no basis for choosing between these two interpretations.

77. There is, however, substantial support in the evidence for plaintiffs' charge that there was racial discrimination in the denial of an incentive-pay plan for workers in the open hearth pits.

When the open hearth furnaces were in operation (the changeover to electrical furnaces was completed at about the time this lawsuit was filed), two different seniority subdivisions were involved in the process. Workers in the melting floor (the "floor" workers) placed the raw materials into the furnaces for melting and supervised the melting process. These workers were physically located at a higher level than the pit workers. The pit

workers prepared the molds to receive the molten metal, poured the molten metal into the molds, and removed the molds after the metal had hardened. The "floor" subdivision was historically predominately white; the "pit" subdivision was historically all black (even by 1978, it was 95% black).

As can be readily perceived, the quantity and quality of work produced in operating the open hearths was a measure of the performance of both seniority units, neither of which could function without the other, nor at a different rate than the other. Nevertheless, Lukens had an incentive-bonus plan for the floor workers, but not for the pit workers.

This differential was a source of great pride and amusement for the floor workers. There was testimony about incidents in which the floor workers would wave their pay checks at the pit workers below, and brag that their incentive pay was greater than the pit workers' total pay.

After many years of complaint and struggle, the pit workers, through the union, sought to obtain an incentive pay program for their unit. The company eventually agreed to provide an incentive pay arrangement for the pit workers, but only if they would give up a previously negotiated agreement concerning crew size in the pit unit. The pit workers were unwilling to yield on the crew-size issue, and no incentive pay plan was ever agreed upon. There were incentive-compensation plans for other units which had crew-size agreements as well, or at least informal arrangements concerning crew size which were observed by both sides.

78. At no time did the collective bargaining agreement provide for incentive-pay in the open hearth pit subdivision. The union sought to negotiate such an arrangement, but, as stated above, was ultimately unsuccessful. Given the fact that the company paid incentive bonuses to the "floor" personnel, however, the company's

refusal to accord the same benefit to the pit personnel had no legitimate justification. I find that this was a clear instance of racial discrimination.

79. In matters of shift-differentials, overtime pay and work assignments, minority employees at Lukens had no greater entitlement than white employees, namely, the entitlements required by the collective bargaining agreements. Any employee whose rights under the collective bargaining agreement may have been violated had the right to press a grievance; and the record leaves no doubt that the grievance mechanism was frequently and widely utilized. Unless there was racial imbalance or unequal treatment in the grievance proceedings, therefore (a topic which will be discussed later in this Opinion), it is reasonable to conclude that the individual claims of discrimination in these respects have been satisfactorily and properly resolved in the grievance proceedings. That is, such proceedings presumably remedied actual departures from collective bargaining agreement entitlements; and if no such departure was established in that proceeding, the probability is that there was no disparate treatment calling for a remedy in this litigation.

While the sheer volume of alleged individual incidents is somewhat disturbing, the fact remains that a great many of the alleged instances seem indistinguishable from the normal gripes which arise and irregularities which occur in any workforce regulated by collective bargaining. It is reasonable to suppose that a great many white employees, too, complained about shift-differentials, work assignments, and overtime compensation. As will be discussed below, analysis of the grievances which were filed during this period suggests that grievances were pursued on behalf of black employees at a rate approximately equal to their representation in the hourly work force. If roughly one-third of all grievances were pressed on behalf of blacks, as the evidence suggests, it would be reasonable to conclude that blacks and whites perceived

violations of the collective bargaining agreement in these respects in approximately proportionate numbers.

For these reasons, I conclude that the evidence in this case provides no basis for granting class-wide relief with respect to matters of scheduling, shift-differentials or overtime compensation.

G. *Discrimination in Discipline*

80. Whether perceived infractions would be noted in the employee's personnel file, whether discipline should be imposed, and the nature and extent of disciplinary action, were all matters primarily within the subjective discretion of individual foremen and supervisors. Most of the persons with decision-making authority in disciplinary matters were white.

81. An employee who left work before the end of his shift, and before his replacement had arrived, was subject to being logged for "early quit". An employee who arrived late was subject to being logged for "late start", and might (particularly if other arrangements had been made in the interim) be sent home, in which case he would be recorded as "absent". And, of course, an employee who failed to report for work, without having telephoned in advance or otherwise reported his unavailability sufficiently in advance of the scheduled starting time, would also be recorded as "absent".

82. Considered in its entirety, the evidence convinces me that a large number of foremen treated their white employees more leniently in these respects than they treated their black employees. This is not to say that blacks were logged for infractions of which they were not guilty. Although there may have been isolated and rare instances of totally unsupported disciplinary charges against blacks, I conclude that disciplinary charges actually logged and recorded against blacks should be regarded as establishing that the violation did in fact occur.

Rather, my conclusion is that white employees in virtually identical circumstances were much less likely to have disciplinary charges brought or recorded against them.

I find it impossible to quantify this differential, but believe it appropriate to keep that differential in mind in analyzing the statistical evidence presented.

83. Black employees made up approximately 33% of the non-craft hourly work force during the period from September 25, 1972, to February 2, 1977. During that period, 56% of all non-craft employees discharged "for cause" were black (approximately 11.4 standard deviations above what would be expected if the discharge process had an equal probability of affecting blacks and whites).

84. Of the 403 total discharges during the above period, 348 occurred in the first three months of employment. The percentage of black employees discharged during their first three months of employment (56%) exceeded the percentage of new hires who were black (34.4%) by 8.5 standard deviations.

Without more, of course, these figures prove very little. That is, they show either that blacks were unsatisfactory employees, or that they were judged more harshly than whites; but it is impossible to tell which is the correct inference.

85. I accept as essentially correct Lukens' contention that there was in fact a valid reason for discharging every person who was discharged. But if the same "reason" relied upon to discharge a black employee did not result in the discharge of a white employee providing the same "reason," an inference of racial discrimination is plainly justified. Accordingly, it is important to try to achieve a comparison between the treatment accorded similarly situated blacks and whites.

86. Lukens maintained personnel records of every employee discharged for cause, containing notations as to the cause for discharge. In many instances, there is also available some further record, such as the minutes of a grievance committee meeting, which sheds light on the basis for the discharge decision.

87. In a very large percentage of discharge cases, excessive absenteeism was noted as a cause, or one of the causes, for the discharge.

88. Both sides have presented statistical studies attempting to determine whether blacks were more likely to be discharged than whites with similar disciplinary records for absenteeism. Plaintiffs' studies were based upon the personnel and other records supplied by Lukens. After plaintiffs' study (which showed significant racial discrimination) was prepared, Lukens conducted further studies which suggested that, in many instances, the "reason" set forth in the personnel records ("absenteeism") was not correctly reported, thus undermining the validity of plaintiffs' studies.

While I remain persuaded, as I stated in the course of the trial, that plaintiffs should be entitled to rely upon Lukens' own records in this respect, I nevertheless recognize that it is often difficult to determine precisely what the real reason for a discharge decision may have been (absenteeism, plus some other relatively minor infraction which proved to be the last straw, or a fairly serious infraction coupled with an unsatisfactory record of attendance).

It does seem reasonable, in this context, to conclude that if absenteeism was expressly noted on Lukens' records as the cause or a principal cause for the discharge, the employee probably would not have been discharged if his attendance record had been better.

Moreover, Lukens contends that absenteeism, to some extent, was a factor in virtually all discharge decisions.

Accordingly, it is important to try to compare the absenteeism records of blacks and whites discharged for absenteeism, and the absenteeism records of all blacks and whites discharged for cause, as well as the absenteeism records of employees who were not discharged.

89. In my view, a very significant bit of evidence is plaintiffs' Exhibit P-1399A, a study which demonstrates that blacks were much more likely to be discharged for absenteeism than whites, unless the absenteeism rate exceeded 30%. Stated otherwise, among employees with the same percentage of absenteeism on their records, blacks were much more likely to be discharged for absenteeism than were whites.

90. Accepting as correct Lukens' contention that some of the "reasons" for discharge were erroneously reported or interpreted, and accepting Lukens' interpretations as the correct ones, does not substantially affect the probative force of Exhibit P-1399A.

91. The data reflected in Exhibit P-1399A include all discharges, irrespective of whether the discharge occurred during the probationary period or thereafter. In the circumstances of this case, the failure to analyze probationary and non-probationary discharges separately does not weaken the probative force of the exhibit nor the conclusions flowing therefrom, namely, that, unless a worker is absent more than one-third of the time, he or she is much more likely to be discharged for absenteeism if black than if white.

Lukens' own evidence (L-2414, 2416) establishes that, among persons discharged during the probationary period, blacks had better attendance records than whites. Moreover, the percentage of blacks discharged during the probationary period for reasons other than absenteeism (*i.e.*, where absenteeism is not mentioned as a cause) was higher than the percentage of blacks among discharges related to absenteeism.

92. As noted above, there is necessarily some lack of precision in assigning "reasons" for discharge decisions. Indeed, it is probable that quite a few errors crept into the Lukens records; many persons initially listed as having been "discharged" might, with equal accuracy, have been described as "voluntary quit". Lukens' original records (*i.e.*, those kept contemporaneously, in the normal course of business) showed 414 employees as having been "discharged for cause" between April 16, 1971 and February 2, 1977 (L-2415). Lukens' witnesses testified at trial, however, that only 341 of those persons were actually discharged. While Lukens' post-trial submissions are not entirely clear on this point, Lukens may be contending that the correct total of persons actually discharged during that period is 326. Accepting Lukens' reclassifications does not change the analysis materially, since very few of the persons reclassified were originally listed as having been discharged for absenteeism.

Among persons indisputably discharged, there are perhaps 15 or 20 instances in which plaintiffs' classification of the "reason" is questionable—*i.e.*, neither clearly correct nor clearly incorrect. I am not persuaded that these discrepancies and uncertainties materially undermine plaintiffs' proofs.

93. Because of its importance in Lukens' overall defense of plaintiffs' charges, this issue of absenteeism merits further discussion.

Lukens has produced impressive evidence that clearly establishes the following:

a. Abstenteeism is a serious problem at Lukens.

b. Viewing the work force as a whole, blacks have much higher absenteeism rates than whites.

c. Controlling for job-level reduces the differential of absenteeism between races, but it remains statistically significant at all levels.

d. Discharged employees have much worse absenteeism records than employees who are not discharged.

Thus, Lukens argues, with considerable force, that it is at least a 99% probability that absenteenism alone explains the racial disparities in discharge decisions.

Plaintiffs counter with statistical studies which demonstrate that job-class itself is a much greater factor in absenteeism than is race (*i.e.*, job class "explains" absenteeism at least three times as well as race). It is not clear to me that this evidence provides much help to either side. If, as the evidence as a whole clearly establishes, blacks are over-represented in the "worst" jobs, where absenteeism is greatest among workers of all races, it would seem that the choice between race and job class as the better predictor of absenteeism would depend merely upon the magnitude of the over-representation of blacks in the job classes prone to absenteeism. And, since the over-representation of blacks in the "worst" jobs is largely traceable to prelimitations discrimination, perpetuated by a bona fide seniority system, the utility of job-class as a predictor of absenteeism is, for purposes of this litigation, severely undermined. That is, to the extent that blacks in each job classification have worse attendance records than whites in the same job classifications, that differential may properly be taken into account by Lukens in its disciplinary decisions, even though black disillusionment and frustration, and dissatisfaction with delayed advancement, may have produced the higher rate of absenteeism among blacks.

94. While the lingering effects of prelimitations discrimination, perpetuated by the seniority system, cannot be taken into account to justify racial differentials in absenteeism, there is still the question whether such justification may properly be attributed to ongoing discriminatory practices. The crux of the absenteeism con-

troversy can be stated as follows: Are blacks at Lukens more subject to discipline because they are less likely to attend, or are they less likely to attend because they are being discriminated against, or both?

Plaintiffs argue, with the support of impressive expert testimony from Dr. Kenneth Clark, that past discriminatory practices at Lukens, coupled with a reasonable perception that discrimination is still likely to be encountered in the work place, presents a serious obstacle to the attainment by blacks of good attendance records. I have no doubt that there are many psychological and emotional barriers which represent significant disincentives to upward mobility on the part of persons who still bear the scars of historic discrimination against members of their race.

The fact remains, however, that the issue in this case is not what vestigial burdens of guilt are properly assignable to society as a whole, but the legal liability of Lukens Steel Company. Under the law, Lukens is required to provide equality of opportunity; but it is not legally liable for failing to intrude upon the private lives of its black employees in an effort to induce them to avail themselves of opportunity. That is, unless Lukens is properly chargeable with tolerating a discriminatory environment, it has the undoubted legal right to insist that all employees, black or white, show up for work when they are supposed to, and complete their shifts as required. Mis-perceptions of the working environment, however subjectively reasonable, cannot form the basis for imposing legal liability upon a private employer. In a perfect world, the rule might well be otherwise. Greater sensitivity on the part of employers to the needs, problems, and perceptions of their employees is undoubtedly a worthy societal goal. But the law does not require perfection, and this court is not free to impose legal liability for failure to attain it.

To the extent, therefore, that differences in absenteeism explain racial differentials in disciplinary decisions, plaintiffs have no cause for complaint in this case.

95. It is difficult to draw firm conclusions about the discharges of non-probationary employees. At least since the present system of progressive discipline was instituted, pursuant to collective bargaining, in 1974, it is probable that the grievance procedures have adequately protected blacks covered by the collective bargaining agreement from discrimination in discharges. Most of the alleged discrimination is attributable to discharges during the probationary period.

96. In 1973 and 1974, Lukens sharply increased its work force. The "bulge" of hirings (and firings) during this period provide most of the raw data for the 1971-77 statistical studies mentioned above.

97. Lukens has presented studies (L-3019, 3020) purporting to show that blacks hired in 1973 had absentee rates in that year of 22.4%, compared to a rate of 15.14% for whites; and that for 1974 hires, the rate was 14.9% for blacks and 7.98% for whites. Lukens has also presented evidence to the effect that persons hired in each of those years, who were discharged by March 1 of the following year, had much higher absenteeism rates than persons who were not discharged (1973: 23.94% versus 13.99%; 1974: 12.96% versus 9.27%).

From these studies, Lukens argues that absenteeism in the first year is obviously (99% probability) related to prompt discharge, hence the greater absenteeism among blacks is a non-discriminatory explanation for the gross disparity in black discharges.

While the basic premise of these arguments is plainly correct—persons who are absent a lot when first hired are less likely to survive the probationary period than persons who have good attendance records—the analysis

has serious flaws. The black-white comparison ("absentee rates in year of hire") is meaningless, since it lumps together persons hired at the end of the year, whose "absentee rates" would be derived from inadequate data, and persons hired earlier in the year. That is, a person hired in mid-December who missed one day's work is counted the same as a person hired in March who missed 45. Whether this defect adversely affects blacks or whites is impossible to tell; the point is, it makes the entire study unreliable.

Less serious in this context, but nonetheless interesting in view of its inconsistency with a major premise of Lukens' argument elsewhere—that probationary and non-probationary discharges must be considered separately—is the fact that both of these studies to some extent lump together probationary and non-probationary employees.

But the most telling point here is what these studies do *not* address, namely, the absenteeism rates of persons who were discharged. The contention that racial differentials in absenteeism account for racial disparities in discharges simply cannot be accepted in the face of uncontradicted evidence that the discharged blacks had better attendance records that the discharged whites.

98. Lukens concedes that the statistical evidence on discharges would justify an inference of racial discrimination, and that the evidence as a whole is consistent with that inference (*i.e.*, does not refute it). Lukens argues, however, that the plaintiffs must go further, and provide specific evidence of erroneous discharges of blacks. That is, unless plaintiffs can show that certain blacks were discharged for no valid reason, they cannot prevail on this issue.

I reject that contention. The issue is whether there is a valid explanation for the fact that Lukens' evaluations of employee-performance during the probationary period so significantly favored whites. Both blacks and whites

were deemed suitable for hiring initially. The probationary evaluations are largely subjective, and performed largely by whites. The criteria, physical health and willingness to learn, are not difficult to achieve. Absenteeism is not the explanation. What is?

99. A significant clue is provided, strangely enough, in Lukens' proposed finding of fact No. 410:

> "It is also undisputed in the record that virtually all discharges took place in 1973 and 1974, a period in which Lukens, for EEO and affirmative action reasons, did no pre-employment testing."

Upon careful reflection, I find this assertion remarkable, and highly significant. It seems to suggest that, if left to its own devices, Lukens would have preferred not to hire so many blacks in the first place. Since "EEO and affirmative action reasons" (so as to remain eligible for lucrative government contracts) ruled out that choice, Lukens simply achieved its objective by means of its relatively unfettered discretionary decisions during the probationary period.

Viewed in its harshest light, this amounts to overt racial discrimination. Viewed more charitably, and probably more accurately, it would seem that preconceived racial assumptions on the part of Lukens' personnel in positions of authority caused them, without evil intent, to evaluate black performance more harshly than white.

100. I conclude that plaintiffs have established that those members of the plaintiff class who were discharged during their probationary periods were discriminated against on racial grounds.

VII. ACCESS TO SALARIED POSITIONS

101. Lukens' salaried work force, as described to the Federal Government as of July 14, 1983, consisted of the following:

Category	Total No. Employees	Total No. Black Employees	Percentage Black
Executives	45	0	0
Middle management	149	2	1.3
First-line management (including foremen)	432	30	6.9
Professionals	194	12	6.1
Technicians	419	10	2.3
Salesmen	17	0	0
Office and clerical	396	18	4.5
Plant protection	43	5	11.6
General service workers	46	10	21.7

(Exhibit P-392)

102. Most Lukens professionals and technicians are hired from outside, but other salaried positions are usually filled from within. Of the 11 top officials at Lukens in 1979, 3 had advanced from initial positions as hourly workers. Virtually all foremen and general foremen have been promoted from within the hourly work force.

103. Except for professional and technical positions, there are no educational requirements for other salaried positions. In 1979, four of Lukens' top eleven officials had only high school educations, for example.

104. There are very few blacks among Lukens' operating management. Lukens has never employed a black officer, manager, or superintendent. Lukens has had only one black supervisor, and he achieved that position in 1974, after this suit was filed. There were no black gen-

eral foremen at Lukens until the 1970s, and as of January 7, 1977, only four blacks were included among the 57 general foremen.

105. I accept as correct the following statements from Lukens' proposed findings of facts Nos. 217 and 218:

> ". . . Movements to salaried positions, unlike movements within the hourly work force, are not affected by the collective bargaining agreement, and hence present an opportunity for the company's exercise of unfettered discretion . . . From the point of view of evaluating discrimination in an employer's practices, it may even be that the single most important set of data involves its selections for foremanship positions . . . This is true both because of the fully discretionary nature of the selection process and because of the particular impact of foremen on the hourly work force generally. . . ."

106. The following table shows the promotions to the position of foreman by race and year:

Year	Total	Black	% Black
1969	17	1	5.9
1970	23	2	8.7
1971	7	3	42.9*
1972	4	2	50.0*
1973	23	4	17.4
1974	29	7	24.1
1975	6	2	33.3
1976	14	3	21.4
1977	17	6	35.2
1978	22	5	22.7
	162	35	21.6

* In view of small numbers involved, the figures for these years are relatively unimportant.

107. Data concerning movements from hourly to salaried positions are available only from 1971. During the entire period from 1971 through 1978, a total of 185 employees moved from hourly to salary status. Of these, 39 (21.1%) were black.

While these figures suggest that Lukens has been "promoting" blacks to salaried positions in proportion to their number among the hourly work force, they do not negative racial discrimination, since they include transfers to *all* salaried positions, and thus include movements into janitorial, clerical, and plant-guard positions.

108. The process by which persons are selected for promotion to salaried positions at Lukens has remained essentially unchanged since 1954. As Lukens concedes, the process is essentially subjective and standardless. While employment department personnel may make recommendations, the final decision rests exclusively with the superintendent of the operating department in which the vacancy exists.

109. At various times, Lukens has required candidates for salaried positions to take various tests. Principal among these is the "Activity Vector Analysis"; each individual being considered for appointment to a salaried position is required to fill out an AVA personality evaluation form (Exhibit P-379), and this is considered in the selection process.

While some Lukens witnesses testified that there is no passing or failing grade on the AVA test, other evidence makes it clear that applicants are in fact generally regarded as having either "passed" or "failed" the AVA test. For example, Exhibit P-873 is a memorandum dated March 31, 1970, between two Lukens superintendents, referring to the fact that a particular candidate had "passed employment's AVA 12-28-67." Exhibit P-1338 is a memorandum from a superintendent to the Employment Department, requesting that a white em-

ployee be promoted to foreman even though he "failed" the AVA.

110. The AVA test has never been validated; Lukens officials were aware that the test is not highly regarded among persons knowledgeable in the field of industrial psychology.

111. Until at least 1974, Lukens also used the Wonderlic test as a screening device for promotion to foreman. Lukens has also used the Schubert General Ability Battery in filling salaried vacancies. Neither of these tests has ever been validated.

112. The evidence overwhelmingly establishes that Lukens discriminated against blacks in the selection of foremen until at least 1971. The relevant facts are set forth below:

a. In 1967, Lukens official James Hall, in a memorandum, described one black candidate for a foreman position as "poised and articulate for a Negro" (P-390).

b. Between 1956 and 1963, class member Samuel Baxter made persistent efforts to become a foreman. He was told to "forget it" and, on at least two occasions, was specifically informed by his superintendent that, but for the fact that he was "a colored man" he would be considered for the promotion.

c. During about the same period, class member Wilfred Mayfield also sought to be promoted to foreman. He was required to take a test, but was never informed whether he had passed it or not. When he was interviewed, a Lukens official asked Mayfield how he would feel about giving orders to white employees, and whether he felt white employees would be comfortable accepting orders from him. During this same period, at least two other white individuals in his department became foremen, and one of them told Mayfield that he had not been required to take any test for the job.

d. In the early 1960s, class member Jacob Meeks was told by his white general foreman that he (Meeks) might become a foreman if he would "ride the asses of colored boys". When Meeks replied that he would "ride" the whites as well, the superintendent told him that he would never become a foreman.

e. In 1964, named plaintiff Ramon Middleton inquired of his white foreman about the possibility of being promoted to a foreman position. He was told that the only thing a black man could do for him was to "give him his sweat"; but that if Middleton behaved himself for two or three years he might be recommended for promotion to foreman. Middleton was later permitted to take a test for the position, but was never informed of the results, and was never offered a foreman job.

f. There were numerous instances, both before and during the limitations period, in which, when there was need for a temporary foreman in a particular department, only white employees would be informed of the vacancy, or be considered for promotion. (*E.g.*, class members Eugene Lopp, Samuel Brown); and numerous instances when blacks were "given the runaround" when they expressed interest in being promoted (*e.g.*, class members Joshua Grove, William Lambert, James Thompson).

g. The experience of class member James Thompson, beginning in the 1950s and extending well into the limitations period, is instructive. He was a very good and reliable employee in the Pits Subdivision, which was almost entirely black. For 18 years, Thompson made repeated efforts to gain a foreman position. Initially, he was told he would have to "wait his turn". Later, after several whites had been promoted to foremen in the (black) subdivision, Thompson learned from fellow-employees that he would have to take a test in order to be considered for the job of foreman.

At the time, Thompson was working the 11 p.m. to 7 a.m. shift. He received a note to report to the clerk in the Open Hearth Department at 8 a.m., at which time he was told that he was scheduled to take the foreman test at 3 p.m. that same afternoon. Thompson resided in Maryland, and a snowstorm had been forecast. He asked if it would be possible for him to take the test at a different time, so that he would not have to make the round trip to Maryland in a snowstorm, but was curtly advised that he would either take the test when it was scheduled, or not at all. Thompson drove home, obtained new snow tires, and returned to take the test as scheduled. A white foreman told him that he was the first black employee in the Pits Subdivision to pass the test for foreman. However, he was not promoted.

Thompson continued to press his efforts to become a foreman. He took the test a second time and passed, but again was not promoted, allegedly because there were other black employees with greater seniority, who had also passed the test earlier. (This in spite of the fact that seniority is not a factor in promotion to foreman, and in spite of the earlier advice that he, Thompson, had been the first black to pass the test.) Two white foremen in the Pits Subdivision had less company seniority and less unit seniority than Thompson.

On March 31, 1970, the acting superintendent of the Melting Department wrote a memorandum to the superintendent of the Melting and Casting Department stating that Thompson had made several requests over the past three years about promotional opportunities (Exhibit P-873). In that memorandum, Thompson was compared only to other black employees. The memorandum confirmed that Thompson had been told that "his name is in the hopper". The memorandum noted that Thompson had no experience as a ladleman. Actually, Thompson had had such experience; moreover, he had never been informed

that such experience was a requirement for the foreman position.

Of particular significance, the memorandum noted that Thompson had "used the term 'discrimination' when talking about the pit-floor, and promotional opportunity."

Thompson was never promoted to the position of foreman, and spent his entire 18 years at Lukens in seniority units which were predominantly black.

h. During 1969 and 1970, 40 persons were promoted to the position of foreman. Only three of these (7.5%) were black (Ex. L-66). During those years, minority employees constituted 23.8% of the hourly work force (L-60). Thus, blacks were promoted to foremen positions during those two years at a rate less than one-third their representation in the pool from which foremen were promoted; a gross disparity which, coupled with the anecedotal evidence, satisfies me that blacks were intentionally denied promotional opportunities, on account of race, at least until 1971.

113. While there was arguable improvement in the situation beginning in 1971 (four of the 11 persons promoted to foreman in 1971 and 1972 (36.3%) were blacks), it was not until 1973 (the year in which this suit was filed) that any real progress occurred. Even by September 1, 1977, blacks constituted only 12.7% of Lukens' foremen.

114. While Lukens did, from 1973 through 1978, promote blacks to foremen positions in proportion to their membership in the hourly work force, even this fact does not rule out racial discrimination during that period, since it is at least arguable that the appropriate "pool" of applicants qualified for promotion to foreman should have included a greater percentage of blacks than their representation in the entire hourly work force, in view of the earlier systematic exclusion of blacks from promotion.

115. During the six-year period, 1972 through 1977, 94 persons (24 blacks and 70 whites) were promoted to the position of foreman. More than 40% of the blacks so promoted were initially placed in pay grades 9 or below, as compared with less than 10% of the new white foremen. This represents a disparity more than 2.7 standard deviations from the random, and is statistically significant at the .01 level.

In *Castaneda v. Partida*, 430 U.S. 482, 489 n. 17, 97 S.Ct. 1272 n. 17, 51 L.Ed.2d 498 (1977), a deviation of "more than two or three standard deviations" was suggested as sufficient statistical proof of *intentional* discrimination.

Lukens' argument that disparities in pay-grade may not necessarily translate into lesser earnings is not persuasive, in the absence of evidence (presumably available to Lukens, but not presented) as to the actual compensation of these 94 persons.

VIII. RACIAL HARASSMENT AT LUKENS

Plaintiffs presented a mass of evidence of individual instances of racial harassment and/or discriminatory treatment. More than 100 such incidents or practices have been addressed in the testimony, involving approximately 35 individual employees. While many of the individual instances pre-dated the limitations period (plaintiffs' evidence clearly fixes about 35 incidents as having occurred within the limitations period, and about an equal number as having occurred either within the limitations period or shortly before—*e.g.*, "in the late 1960s" or "between 1965 and 1970"), all of this evidence may properly be considered in assessing the conditions which prevailed during the limitations period. That is, in determining whether instances of racial harassment or discriminatory treatment during the limitations period should be regarded as mere isolated occurrences, or as supporting

an inference of pattern or practice, pre-limitations events, if not too remote, provide useful information.

I do not propose to discuss each individual instance in detail. I have carefully reviewed and considered the voluminous submissions of the parties on these subjects. Several of the more egregious examples are, in my view, too remote in time to be helpful. Many others lack adequate evidentiary support, or have been adequately explained as not involving racial considerations. Some of the more clearcut, and persuasive, examples will be set forth in the Findings of Fact immediately following.

116. In late 1973, Lyman Whitfield, a black, had been newly promoted to a foreman's position. He attempted to provide some direction and instruction to a white employee, whose nickname was "Bobcat". Bobcat angrily rebuffed Whitfield's instructions, and went so far as to state "You'll get yours, you fucking nigger."

Mr. Whitfield reported the incident, in writing, to his (white) superintendent, Mr. Cabot. Cabot arranged to have Bobcat report to his office for a discussion of the incident, but no disciplinary measures of any kind were taken against Bobcat.

Lukens' response to this evidence is totally unsatisfactory. Lukens asserts that Bobcat presumably was given a verbal reprimand, and that "there is no evidence of any basis for disciplinary action except the alleged racial remark." In the first place, the record fairly bristles with instances of black employees being severely disciplined for insubordination, with far less reason than was provided by Bobcat. But that is not the crucial point: The racial slur itself should obviously have triggered disciplinary action, quite apart from the insubordination aspect.

117. In February 1975, a white employee named Taylor improperly refused to allow Daniel London, a black, to use certain tools he had been directed to obtain. A heated

discussion ensued, in the course of which Taylor called London a "black bastard", whereupon London struck Taylor a blow with his fist.

London was suspended for four days without pay, and was placed on probation for three years (he had no previous record of fighting, and the prescribed penalty for a first offense was four days suspension). Taylor, on the other hand, was not disciplined at all.

118. In May 1971, John Baxter, a black, was assigned to the position of checker in the Shipping Department. He was told by a white employee in that department that the job was really "a white man's job". And Charles Rice, a white gang leader in the Car Blockers Department, repeatedly told Baxter that the Shipping Department was "all messed up" by blacks.

119. Some time after mid-1968, a black employee named Boyd became foreman in the 206-inch Gas Cutting Department. Shortly thereafter, a mock-grave, complete with headstone and "KKK" symbols was constructed in that department, by unknown persons.

No disciplinary action was ever taken because of this incident. Lukens asserts that there was "no indication of who was responsible, and thus no occasion for disciplinary action."

There is no evidence as to what efforts, if any, were made to investigate this incident. I am inclined to believe that it should not have been very difficult to ascertain the identity of the probable culprits. But for present purposes, it suffices to note that if Lukens had conducted a thorough investigation, including interviews of the persons working in the department at the appropriate times, a salutary message would thereby have been delivered.

120. In 1969, Steven Branch, a black, became a millwright-helper. From that position, the next upward step is to class C millwright, class B millwright, and class A millwright. Helpers are expected to receive on-the-job

training from other millwrights, in preparation for taking and passing the required examinations for each of these advancements. In the case of Mr. Branch, however, this proved difficult, because the other millwrights, all of whom were white, refused to talk to him because he was black.

Mr. Branch's difficulties continued through at least 1972. There were only 20 employees in the entire department, and it is therefore impossible to avoid the inference that the foremen and supervisors in that department were aware of the racial tension and of Mr. Branch's discriminatory treatment. No corrective action was ever taken, nor was any discipline ever imposed upon any of the white millwrights.

I reject as unsatisfactory the response proffered by Lukens, namely, that Mr. Branch eventually did manage to get promoted up the career ladder to class A millwright, and that there was no evidence that the white millwrights had been specifically assigned to teaching duties, so as to be amenable to discipline for failing to perform teaching duties. Mr. Branch was plainly entitled to be treated the same as whites in equivalent positions, and the white millwrights were plainly subject to disciplinary action for racial discrimination. This entire episode amounts to clear evidence of Lukens' toleration of racial discrimination.

121. In 1971, while employed as a millwright, Steven Branch was usually assigned to work in the 120-inch mill. On occasion, he would be assigned temporarily to work in the 206-inch mill, but whenever he was dispatched to that department, he was not allowed to work there, but was invariably sent somewhere else. At least three other black employees, Tillman, Hooper and Washington, had the same experience.

Lukens asserts that this evidence should be disregarded, because plaintiffs did not present evidence that white

employees were not also turned away when temporarily assigned to the 206-inch mill. In my view, however, the inference of racial discrimination is strongly supported by plaintiffs' evidence, in the absence of some reasonable explanation or refutation.

122. In late 1971, Charles Goodman, a black, was employed as a janitor. One of his jobs was to clean the "pulpits" (shelters raised above the ground, from which the rollers and presses run). One of the pulpits was kept locked. When given his initial tour of the area on a Friday afternoon, Goodman was provided with a key to this pulpit, which he was expected to clean before it was opened the following Monday morning. The two employees working in the pulpit at the time were white.

When Goodman arrived at the pulpit on Monday morning, he found written on the wall of the pulpit the words "Go home nigger. You don't belong here."

Goodman reported the incident to the head of the Sanitation Department, Clarence Wirth, who is white. Mr. Wirth said, "Don't worry about it. Just go on back to work." No one was disciplined for this incident, although apparently the two white employees were required to remove the offensive language from the pulpit wall.

123. In 1974, Gary Jones, a black, was assigned to learn the job of heater, by working with an experienced heater named Derring, who was white. However, Derring refused to give Jones any on-the-job training, and, indeed, would not speak to him. When Jones complained to the foreman, Derring told the foreman that he would not teach Jones anything.

Eventually, Jones was reassigned to a black heater for on-the-job training. No disciplinary action was ever taken against Derring because of this incident.

124. At some unspecified time "in the 1970s" James Clifford Kennedy, the only black general foreman at

Lukens, was subjected to having the words "Uncle Remus" painted on his hard hat, and "KKK" symbols scrawled on his work papers; and, apparently, his work shoes were filled with sand.

125. In 1976, William R. Mayo, a black, became involved in a dispute with his general foreman, Earl Doan, who is white. In the course of a heated discussion, Mr. Doan stated, "You black people are all alike." No action was taken against Doan for this incident.

There was evidence of several other instances, mostly in the pre-limitations period, in which Mr. Doan exhibited unenlightened racial attitudes. The fact that Mr. Mayo was not himself disciplined on this occasion does not, in my view, negative the plain implication of toleration of discrimination by Lukens.

126. On several occasions between 1969 and 1972, Kenneth Young, a black crane operator, was singled out out for unjust and harassing treatment by white foremen or supervisors (Messrs. Gay and McBride).

127. In 1972, Mr. Young, while working as a crane operator, was assigned to the loading bank of the 120-inch mill. No other blacks were employed in that area, and Young was subjected to constant harassment, especially by a white employee named Trythall. A white foreman, Harris, reprimanded Young for his constant problems in getting along with Trythall. It is probable that Harris would have imposed the same discipline on Trythall if he had had authority to do so. In fact, however, Trythall was not disciplined; and even if he had been, this would still suggest that, at Lukens, when a white employee is involved in a racial dispute with a black, both are culpable.

128. During the 1970s, a white employee named Herbert Pratt was employed as a clerk. He constantly and repeatedly made racially derogatory comments to and about black employees, apparently in the belief that such

remarks were humorous. Throughout 1974 and 1975, Pratt frequently made statements to the effect that the only employees who could get ahead at Lukens are blacks, and made racially derogatory remarks about blacks who took time off.

When Oscar York, a black, complained to his general foreman, Fred Nill, a white, about Pratt's conduct, Nill falsely claimed that he was totally unaware of the behavior. Actually, Nill could hear conversations occurring in Pratt's cubicle, and frequently laughed when he heard Pratt say something humorously derogatory about blacks.

Black employees complained to James Hall, Lukens' employment supervisor, about Pratt's habit of addressing blacks as "curly" when greeting them. In October 1978, the Coatesville chapter of the NAACP formally complained about Pratt's having listed a black employee as "Geraldine" on a posted work schedule.

In response to these various complaints, Lukens officials discussed the situation with Pratt and urged him to mend his ways, and eventually gave him a written reprimand, which became part of Pratt's personnel file. On the other hand, no suspension or other substantial discipline was ever imposed against Pratt, and his conduct continued substantially unchanged until at least 1978.

129. A white general foreman at Lukens, John Primer, made frequent derogatory remarks about black employees when they took time off. His expressed view was that blacks are lazy and do not want to work. He was never disciplined for this conduct.

130. In 1973, John Keller, a white, addressed racial remarks to a black employee in front of his supervisor, Denny Howell, also white. Howell testified at trial that he gave Keller a written warning for this conduct, but no such warning appears on Keller's personnel record. Three years later, in 1976, a similar incident occurred

in the presence of Howell. Howell testified that Keller was disciplined by being suspended for one day; again, however, Keller's personnel record shows no such disciplinary action.

131. Racially derogatory graffiti have regularly and constantly appeared on the bathroom walls at Lukens for at least 30 years. From time to time, steps are taken to eradicate or paint over the offending material, but the respite is invariably brief. The evidence does not establish the identities of the culprits, needless to say.

It is clear that Lukens deplores the practice. On the other hand, plaintiffs correctly note that Lukens has not made any concerted effort to improve the situation. Not long before the onset of the limitations period, for example, a complaint to the white supervisor of the affected area concerning a particularly noticeable and offensive racial slur on the wall was greeted with a shrug and the statement "I didn't put it there." And it was not until after the start of trial in this case that Lukens, for the first time, posted notices formally prohibiting the practice, and informing employees that persons found guilty of defacing the premises with racially offensive remarks would be disciplined.

132. On an occasion (date uncertain, but within the § 1981 limitations period) a cross was burned in an area where many blacks would normally congregate to change clothing. The record does not disclose the extent of the investigation, if any, which Lukens may have conducted after this incident. It is clear that no one was disciplined.

133. On July 12, 1978, at least three Lukens employees, one of whom apparently was a salaried employee, wore Ku Klux Klan armbands to work at Lukens. The two hourly employees involved were ostensibly given a three-day suspension as punishment; however, the sched-

uling of the suspension was such that one lost one day's pay, and the other lost four hours' pay.

134. From the evidence in this case, taken in its entirety, there emerges a reasonably clear picture. For decades, the races at Lukens were segregated, as a matter of official company policy. It was not until 1966 that segregation in locker room facilities was finally eliminated. Many of the same officials who occupied positions of authority during the segregated period continued to occupy positions of authority, at an even higher level, during the limitations period; and several of these were shown to have been involved in overt racial discrimination in the pre-limitations period.

There can be no doubt that a substantial number of white employees on the Lukens payroll harbored strong feelings of racial prejudice against blacks. Lukens employees, like everyone else, became aware of the civil rights struggles of the 1960s, but that did not automatically translate into changes in racial attitudes. Indeed, given the generally prevalent ambivalence toward "demonstrations" and "demonstrators", it is reasonable to suppose that racial tensions increased, or at least surfaced to a greater extent, during that period.

It is apparent that Lukens management preferred to avoid confronting racial issues if at all possible. Some foremen and higher officials—undoubtedly, only a few—shared the racially biased attitudes of some of the white hourly employees, and most of the rest of Lukens management were apprehensive—unduly so, probably—about the potential adverse effects upon the morale of the white work force, if prompt and significant changes in favor of blacks were implemented.

The net results were (a) too-frequent toleration of continued harassment of blacks by whites, on racial grounds; (b) passive encouragement of the belief that individual acts of racial discrimination would go unpun-

ished; and (c) a tendency to presume that any charge of racial discrimination was, almost by definition, either totally unfounded or quite trivial.

IX. MISCELLANEOUS MATTERS

A. *Suggestion Awards*

135. Lukens has long maintained a "suggestion system" offering rewards to employees who make suggestions for the improvement of the company's methods, products or services. The Lukens' Employee Manual states "All suggestions are investigated carefully by the people best qualified to judge their value. If a suggestion is found to be useable, you receive a cash award based on its estimated value to your company." (Exh. P-339A, p. 27.)

Over the period from 1965 through 1976, Lukens made 2,267 awards, totaling $185,825.25 to white employees for suggestions, and 75 awards totaling $5,205.25 to black employees for suggestions (Exh. P-144) (there were also 13 awards, totaling $432.50, to employees whose race is not disclosed). Thus, black employees received 3.2% of the awards, and 2.8% of the money awarded.

136. Analyzing salaried and hourly employees separately does not significantly alter the disparity. Blacks received 3.5% of the awards given to hourly employees, and 1.6% of the awards given to salaried employees. Limiting the analysis to the limitations period does not alter the disparity: blacks received 2.9% of the awards and 3.2% of the money awarded, between 1968 and the end of 1976.

137. Plaintiffs presented the credible evidence of class member Jacob Meeks, to the effect that he and other class members had made suggestions for which they received no awards, even in cases where the suggestion was adopted and implemented, whereas white employees

received awards for suggestions which proved to be impractical. Lukens presented no testimony or other evidence on this subject.

138. Lukens correctly points out that there is no evidence concerning the relative number, or the relative merit, of suggestions presented by blacks and whites respectively. Thus, the statistical evidence cannot be interpreted as proving that decisions to grant or withhold awards for suggestions were made in a racially discriminatory manner.

But this does not mean that the foregoing evidence should be totally disregarded. There are only a limited number of permissible inferences which are consistent with the statistical evidence outlined above. If the percentage of participation by blacks and whites in the suggestion program is roughly proportionate to their respective numbers in the work force, there are only two possible conclusions: either racial discrimination tainted the evaluation and award process, or blacks, as a group, systematically, year in and year out, produced suggestions having less merit than the suggestions made by whites. I regard the latter possibility as distinctly far-fetched.

If, on the other hand, only 2 or 3% of the suggestions were made by blacks (*i.e.*, if the percentage of black participation in the suggestion program was sufficiently low to justify the conclusion that the small percentage of black awards was racially neutral), it would be difficult to conclude that blacks were made aware of, and encouraged to participate in, the suggestion awards program to the same extent as their white counterparts.

In short, while the statistics of the suggestion awards program do not provide definitive answers, the gross disparities reflected therein do raise further serious questions about racial equality at Lukens.

B. *Lukens' Affirmative Action Efforts*

139. The hierarchy of Lukens officials responsible for equal employment opportunity matters is as follows: J. Louis Irwin, as head of Industrial Relations, was the person in Lukens' management ultimately responsible for equal employment opportunity affairs from 1964 until 1979. Under him, from 1966 through 1979, was Norris J. Domangue, Director of Personnel Administration; he has general oversight responsibilities for the EEO office at Lukens.

Under Domangue, James Hall, head of the Employment Office, has been in charge of developing Lukens' affirmative action programs for submission to the Federal Government, since before 1970. At the time of trial, Barry Patterson headed the company's EEO office, assisted by John Robinson, Jr. Before the EEO office was formally organized (in about 1974), Hall was responsible for carrying out what later became that office's functions.

Of the five persons named above in this hierarchy, only Robinson is black; his services began after this lawsuit was filed.

140. Notwithstanding the massive amount of incontrovertible evidence of historical discrimination on account of race at Lukens, all five of these persons, in their trial testimony, professed total ignorance of any racial discrimination at Lukens at any time.

141. Mr. Irwin, who has been employed at Lukens since 1933, testified that the racially disproportionate nature of seniority subdivisions (including units which were entirely black and other units which were entirely white) was the result of personal choice on the part of employees. He based this conclusion solely upon his observation that, indeed, some units were either entirely black or entirely white.

On the basis of his personal view that blacks preferred to be with each other rather than with whites, Irwin fur-

ther testified that segregation of the locker rooms at Lukens occurred entirely as a result of personal choice of the employees. And, based upon his familiarity with Coatesville and its inhabitants (he having been born there), Irwin further testified that Lukens has had a policy of non-discrimination throughout his entire tenure with the company; and that, as far back as 1933, there has been a consistent trend toward greater opportunity for blacks at Lukens.

Conceding that from time to time he had received complaints about racial discrimination at Lukens, including some from the NAACP, Irwin nevertheless concluded that, as to each and every one of these complaints, intentional racial discrimination was not involved. Presented with a 1970 document which he had received from another company official, John Muhs, and which expressly referred to "past racially discriminatory hiring practices" at Lukens, Irwin testified simply that he did not know what hiring practices Muhs was referring to.

142. Mr. Domangue, who has been employed at Lukens since 1957, testified that, even before 1964, racial discrimination did not provoke complaint or discontent among black employees; that race never was a factor in the assignment of lockers; that any employee was free to take any available locker as his own; and that the racial composition of the various subdivisions at Lukens is not a result of racial discrimination.

143. Mr. Hall testified that no management person at Lukens had ever suggested that blacks at Lukens were ever treated differently than whites because of their skin color. Hall testified that he himself has always tried to deal with people in a color-blind way.

In a memorandum prepared by Mr. Hall shortly after he was visited by EEOC investigators in 1972, he noted the race of the investigators in the opening paragraph of his report (Exh. P-389).

In 1979, John Robinson prepared a study, at Hall's direction, which showed that a disproportionate percentage of black employees who reapplied for employment at Lukens after having previously worked there were rejected by the company. The only action taken by Hall in response to this study was to examine some of the underlying data himself.

144. Mr. Patterson, after having worked in the EEO office for four years, testified that he had never encountered a single case in which he was able to conclude that Lukens was engaging in racial discrimination, or a single instance of harassment directed at blacks on racial grounds. In Patterson's view, complaints of such harassment were, for the most part, attributable to the fact that the employee in question "perceived" racial discrimination where none in fact existed.

145. The testimony of Mr. Robinson, to the effect that during his two years as Patterson's assistant in the EEO office, he likewise has found no incident in which he felt there was any racial discrimination, is largely neutralized, since he began work there after this lawsuit was filed, and has been largely preoccupied in gathering statistical information for Lukens' defense of this suit.

146. Lukens' formal affirmative action efforts were prompted by the enactment of Title VII, the promulgation of related executive orders, and Lukens' substantial involvement in government contracts.

147. In June 1964, Lukens promulgated a document entitled "Plan for Progress," setting forth what were purportedly the company's goals for achieving equal treatment of minority employees. As director of industrial relations, Mr. Irwin was chairman of the "Plan for Progress Committee".

148. A 1964 company memorandum describing the "Plan for Progress" stated that Lukens has a "longstanding policy of non-discrimination in employment"; when

that statement was made, locker rooms at Lukens were still segregated.

The same memorandum, in noting that "Negroes [are] heavily concentrated in the lower job classes" lists as one potential contributing factor to that phenomenon "lack of personal motivation and initiative".

149. In late 1970, Lukens promulgated a document entitled "Affirmative Action Policy" which was identified as "a revision of Lukens' 'joint statement of Plan for Progress' adopted in 1964." This document, written by Mr. Hall, also refers to Lukens' "longstanding policy of nondiscrimination in employment."

150. According to the 1970 affirmative action policy, "a Plan for Progress Committee was formed, and a program of action initiated" beginning in 1964; and the Committee was "charged with establishing policy, outlining objectives, stimulating action, and reporting results." The evidence at trial makes clear that the activities of this Committee and the results of its efforts, if any, were decidedly limited.

151. As the director of Industrial Relations, Mr. Irwin sent a memorandum to various Lukens officials in 1970, directing that Lukens' Affirmative Action Program be considered "confidential", and "to be made available only to committee chairmen and members of the Advisory Committee." The committees referred to were formed ostensibly for the purpose of implementing the Affirmative Action Program; the committee chairmen were all white Lukens officials. There is no explanation in the record as to why the program should have been considered "confidential"; indeed, Mr. Domangue testified that he knew of no reason why the company's Affirmative Action Program could not have been shared in its entirety with Lukens' employees, or why the program should have been marked confidential.

Lukens asserts, in its post-trial submissions, that the Affirmative Action Program had to be kept confidential because it contained information concerning Lukens' work force and operations which might have aided its competitors. Apart from the fact that there is no evidence which supports this argument, it seems obvious that the existence of an affirmative action program, and a redacted version of the plan, could have been disclosed.

152. Under the Affirmative Action Program, an Affirmative Action Committee was established. Mr. Hall was a member of that Committee. Mr. Hall testified that, while the Committee did not meet on any scheduled basis, it did meet fairly often. Actually, however, between April 1971 and October 1972, a period of 17 months, there was not a single meeting of the Affirmative Action Committee (P-1214).

153. The 1970 affirmative action policy document refers to "disproportionate, racially segregated, seniority units" at Lukens (P-114, p. 3). But the 1972-1973 affirmative action policy document, prepared after the charges involved in this litigation had been filed with the EEOC, contains no such reference (P-124). There had been no substantial change in the racial composition of seniority units in the interim.

154. The Office of Federal Contract Compliance Programs ("OFCCP") makes periodic reviews of Lukens Affirmative Action Programs and efforts, for the purpose of ensuring compliance with Executive Order 11246. The results of these reviews have a substantial bearing on whether Lukens may continue to contract with the Federal Government.

155. As part of its obligation under this review, Lukens supplies to the OFCCP statistics showing the breakdown of the work force between craft and non-craft jobs. In making this breakdown, Lukens did not use the job classifications set forth in the collective bar-

gaining agreement, but rather classified as craft jobs additional jobs not so characterized in the collective bargaining agreement. This enabled Lukens to report to the OFCCP that minorities were represented in craft jobs at much higher percentages (more than 50% higher) than would have been reflected if the collective bargaining agreement classification scheme had been utilized.

156. Mr. Hall, who had major responsibility for dealing with the OFCCP, testified at trial that Lukens' Affirmative Action Program had been approved by the OFCCP. It turns out that Mr. Hall was in error.

The OFCCP has determined that Lukens' 1978-1979 Affirmative Compliance Program is not acceptable (P-1405). In a letter to Charles A. Carlson, Chairman of the Board of Lukens, the Director of the Philadelphia Office of OFCCP, Thomas S. Bush, stated, "It has been determined as of September 21, 1979, that Lukens Steel Company does not have an acceptable written Affirmative Action Compliance Program." This letter was a confirmation of matters discussed during a "closeout conference held September 21, 1979" at Lukens, attended by Messrs. Irwin, Domangue, Hall, Patterson, and Robinson. The letter further states that "Your facility cannot be considered in compliance with Executive Order 11246, as amended, unless a binding conciliation agreement is received which reflects a statement of each deficiency, the citation of the violation, and the corrective action taken."

When Lukens responded to a subpoena issued by plaintiffs, requiring all correspondence from the OFCCP regarding Lukens' affirmative action compliance status, no conciliation agreement was included (P-1425).

157. Mr. Patterson, the Equal Employment Opportunity Administrator at Lukens, has been employed at Lukens since 1971, and has headed the EEO office since January 1976. He had no professional experience in the

equal employment opportunity area, nor had he participated in any equal employment or civil rights organizations. Throughout his first five years at Lukens, he was involved exclusively in the area of public relations.

158. Among Patterson's responsibilities as head of the EEO office is the handling of all official and unofficial complaints of discrimination filed against the company by applicants or employees. He also has responsibility for drafting the company's Affirmative Action Plans, and for dealing with governmental agencies on equal employment opportunity problems.

159. Mr. Patterson has been aware, throughout his tenure at Lukens, that there are job groups which are disproportionately white and other job groups which are disproportionately black. Nevertheless, as head of the EEO office, he has never engaged in any investigation, and does not know of any investigation, as to why these disparities existed. He did not conduct, and does not know of any, investigation into the disparate impact of the transfer procedure at Lukens.

160. At the time of trial, Mr. Patterson had been head of the EEO office at Lukens for four years. Twenty members of the plaintiff class testified at trial that they did not even know who he was. This does not, of course, mean that they did not know there was an EEO office at Lukens, but it strongly suggests something less than enthusiastic dedication to EEO issues on the part of that office.

161. In late 1978, class member Wilfred Mayfield felt that he was being discriminated against on racial grounds in connection with certain scheduling problems. His white supervisor, Mr. Glazer, agreed that there was merit to his complaint, but stated that he had no power to change the situation, and suggested that Mayfield consult his union representative. Mayfield's dissatisfaction continued, after consultation with union representa-

tives, and he discussed his problems with OFCCP officials who happened to be in the Coatesville area. They suggested he consult Mr. Patterson. Mayfield did not know who Patterson was, and the OFCCP officials told him. Mayfield consulted eight or ten other black employees, none of whom had ever heard of Patterson.

Mayfield arranged an appointment with Patterson for the following day at 4 p.m. When he arrived for his appointment, Patterson was not present, but his assistant, John Robinson, met with Mayfield. In the course of their conversation, Mayfield asked Robinson how long the EEO office had been in existence, and learned that it had been established about three years earlier. Mayfield then asked why it was that so few people knew about the office. Robinson told him that the EEO office had orders from "higher up" to operate on a very low key.

Mayfield was told by Robinson that he would set up a meeting with the appropriate officials to discuss Mayfield's problem. About a week later, Mayfield was told that the meeting had been set up, but that Mayfield's attendance would not be appropriate. Mayfield never received any further information about whether the meeting was held, or what the results may have been. Periodic inquiries since then produced no results. As late as February 1980, during a recess in the trial of this case (some 14 months after the initial contact with the EEO office), Patterson advised Mayfield that he was "still working on" the problem.

162. Lukens has undoubtedly made some efforts to pursue affirmative action goals during the limitations period, and has made some progress. As noted above, Lukens established an EEO office, or its equivalent, in 1974. The EEO office is located in close proximity to the employment office. Personnel in the employment office have been made aware of Lukens' commitment to

affirmative action and equal employment opportunity during their training and at weekly meetings, attended by representatives of the EEO office. Lukens has undertaken a program of recruiting at black colleges, including Cheyney State College, Lincoln University and Southern University; has participated in cluster programs at black institutions in other parts of the country, including Atlanta University; and has implemented programs at the local level to increase employment opportunities for blacks. Specifically, since 1968, Lukens has worked with the Coatesville area school district in a hardcore unemployment program ("STEP") and a counseling and training program ("CASH"). And Lukens has been involved in the National Alliance of Businessmen JOBS program, involving commitments to the hiring of underprivileged individuals, principally black.

On the other hand, none of these programs or efforts appears to have had much actual impact upon the conditions and atmosphere of the work place. At least until well after this lawsuit was filed, Lukens' efforts were plainly kept rather quiet, so as to avoid both the "problems" with white employees harboring racial prejudices, and the need to acknowledge, and face up to, the reality of past and continuing discrimination. The inference is reasonably clear that Lukens was primarily interested in providing evidence of progress sufficient to satisfy the OFCCP and other governmental agencies, but either did not understand, or resisted the idea, that genuine and substantial deviations from customary attitudes and employment practices would be required.

163. For example, so far as the record discloses, only a single black person was hired by Lukens as a result of its allegedly extensive college recruitment efforts.

164. Class member Al Carey, a black, served for two years as Lukens' "recruiter" among black colleges in this vicinity. Because Lukens was primarily interested in college graduates with technical backgrounds, Mr. Carey

admittedly had somewhat less opportunity for recruitment than did recruiters from other corporations. Nevertheless, during his two-year stint, he located, and referred to Lukens, at least 16 qualified blacks, all of whom applied for employment. None of these 16 applicants was hired.

After two years, Mr. Carey quit the recruiting program. It was his feeling that he was being "used" by Lukens, in an effort to create the appearance of equal opportunity, but that genuine commitment to that principle was lacking.

165. Lukens points to two other aspects of the evidence, as demonstrating Lukens' efforts to ensure greater opportunity for minority employees: (a) an instance in which Lukens allegedly lowered the passing score on a test so that a black could obtain promotion, and (b) Lukens' ongoing, albeit unsuccessful, efforts to merge seniority units. Upon closer examination, however, these arguments backfire.

a. On an occasion in 1975, the passing score on a shop math test was lowered in connection with a job posting for the Mechanical Riggers Subdivision, and this enabled class member Hilton Matthews to qualify for a transfer into the unit. But the same lowering of the passing score also enabled two white persons, Messrs. Tomaski and Perring, to qualify; and, when the transfers were effectuated, the two whites were placed above Matthews on the seniority list, even though they had less company seniority, and equal unit seniority, with Matthews.

b. Under the terms of the collective bargaining agreements, the company has complete control over job assignments and changes within a seniority unit, but cannot assign an employee in one seniority unit to perform work in another seniority unit. And transfers from one seniority unit to another are, of course, governed by the job-posting and company seniority procedures. Accordingly, a

fairly constant theme of collective bargaining negotiations over the years has been the company's desire to reduce the number of seniority units through mergers and consolidations, and the unions' opposition to these efforts. But, as the evidence presented by the defendant unions demonstrates, the company's merger proposals have never been put forward as intended or expected to ameliorate racial disparities among the existing units; indeed, many of these proposals would have merged white units with other white units, or black units with other black units.

X. PLAINTIFFS' CLAIMS AGAINST THE UNION DEFENDANTS

166. The defendant International Union is the recognized bargaining agent, certified by the National Labor Relations Board, for each of its locals, including Locals 2295 and 1165. Collective bargaining agreements are negotiated by the International Union on behalf of local unions. In practice, the International Union negotiates "basic steel" agreements with the nine or ten largest steel companies, leaving to local bargaining only the implementation of the basic steel terms or the correction or improvement of those terms to suit local conditions.

167. The International and the local unions jointly "act exclusively as the member's agent" in grievance proceedings and "other matters relating to terms and conditions of employment arising out of the employer-employee relationship" (U-359, Article XVII, Section 3, p. 92). An International staff representative is present at Lukens at all times, and is in charge of the local collective bargaining, and also all fourth-step meetings and arbitrations in the grievance process. The district directors of the International Union also have some responsibilities for the local collective bargaining negotiations.

168. Since 1956, all hourly employees at Lukens have been required to join either Local 1165 or Local 2295 after having been employed by the company for 30 days.

169. At the time of trial, Local 1165 had approximately 2600 members, and Local 2295 had approximately 80 members (down from a World War II maximum of approximately 600 members).

170. Local 2295 has jurisdiction only within the Welded Products Division of Lukens, which has historically been predominately white. Accordingly, Local 2295 has had very few black members (not more than 12 at any one time since 1967) and has never had a black president.

171. Local 1165 has many black members (presumably, approximately 25% of the membership) and blacks have actively participated at its meetings and in its affairs, although no black has yet been elected president of Local 1165.

172. As discussed previously in this Opinion, the evidence as a whole does not preponderate in favor of a finding that the union defendants (or, more properly, their predecessors) were motivated by racial considerations in establishing the seniority system at Lukens. And, under established precedent, the unions' resistance to the abandonment or undermining of the seniority principle as an acceptable method of achieving greater racial equality is not actionable.

173. There is a great deal of evidence pertaining to pre-limitations events which casts serious doubt on the unions' total commitment to racial equality during that period. For example:

a. The 1962 "basic steel" negotiations produced agreement upon the inclusion of a provision outlawing racial discrimination. At the local negotiations at Lukens, however, the possibility of including that clause in the Lukens agreement was not even discussed. No such nondiscrimination clause was included in a Lukens agreement until 1965; and then, apparently, it came as the result of a suggestion by the company, rather than the

unions (and one need not be unduly cynical to suggest that, by that time, it was thought desirable to include such a clause, for OFCCP purposes).

b. The unions never took any action to complain about the segregated locker facilities or other blatantly discriminatory practices at Lukens. Indeed, when, pursuant to pressure from the Pennsylvania Human Relations Commission, Lukens was required to complete the process of desegregating the locker rooms, the unions' International representative informally allowed Lukens an extension of time to complete the transition. As noted elsewhere in this Opinion, the process of desegregation was not complete until 1966.

c. In 1962 or earlier, class member Joshua Grove complained to Local 1165 President Joseph Foy about the segregated facilities. Foy told Grove that the company would not then agree to integrate and upgrade the locker room facilities, and asked Grove to delay filing a charge with the Pennsylvania Human Relations Commission, voicing concern over possible "repercussions" if racial integration were pushed.

d. In the mid-1960s, a group of black employees in the Open Hearth Pits Subdivision organized a committee and complained to the company about the segregated facilities and other discriminatory policies. Although at least two members of the committee were union shop stewards, they received no help from the union. Indeed, at trial, the gentleman who had served as president of Local 1165 from 1964 to 1970, testified that he was unaware of the existence of any such committee, and had no recollection of any group of black employees having complained about racial matters at the time.

174. The evidence reviewed in the preceding findings does not provide grounds for relief against the defendant unions in this case. We are concerned here with actions and practices during the limitations period.

175. Plaintiffs assert that the unions have discriminated against blacks during the limitations period in its handling of grievances under the collective bargaining agreement. Upwards of 8,000 grievances have been filed at Lukens during the limitations period. The steady increase in grievance filings each year has not produced a corresponding increase in the capacity of the grievance-processing system to handle complaints. As a result, the grievance procedures at Lukens are characterized by the following:

a. Serious grievances (*i.e.*, those involving more than a four-day suspension, and those involving discharges) are given priority. And, because each "zone" within the plant handles its grievances separately at the early stages, and fourth-step hearings are held only once or twice each month, an attempt is made to allocate the hearing-time among the zones.

b. The time limits imposed by the collective bargaining agreement for scheduling the various steps of the grievance procedure are not being met, and are largely ignored.

c. In an effort to alleviate the backlog, there has been an increasing tendency on the part of the unions to dispose of less-serious grievances by simply withdrawing them "without prejudice". This means that the affected employee gets no relief but that the union is not precluded from challenging that grievance on the merits in a later grievance proceeding.

In short, the manner in which the unions handle employee grievances at Lukens does not fully comport with the terms of the collective bargaining agreement, and is subject to legitimate criticism. There is, however, no hard evidence to support an inference that these inadequacies disadvantage blacks to a greater extent than whites. Some members of the plaintiff class testified to a general perception among black employees that their grievances

are handled less expeditiously and with less enthusiasm than the grievances of white employees, but it seems clear from the evidence that whites and blacks alike have reason to complain.

176. An analysis of the grievances which reach the final step, arbitration, reveals that grievances asserted on behalf of black employees represent approximately the same percentage of such grievances as the percentage of blacks in the hourly work force. And some evidence presented by Lukens suggests that there is approximately the same racial breakdown of grievances initially filed, although the evidence is not entirely clear on that point. And the union defendants have presented evidence tending to show that, among grievances pursued through arbitration, success was achieved on behalf of black grievants at a slightly better percentage than whites. Specifically, 46.5% of black grievants achieved success in arbitration, compared to 31.8% of white grievants.

I find it impossible to draw any definitive conclusions from this evidence. It may mean that blacks are more likely than whites to be the targets of undeserved discipline serious enough to warrant arbitration. It may mean that either the unions, the company, or both are more inclined to, or at least more successful in, settling white grievances short of arbitration. Or it may mean that the unions more diligently pursue black grievances than white. It may mean none of the above.

Plaintiffs correctly point out that, in the absence of evidence showing what percentage of all grievances, black grievances and white grievances are pursued through arbitration it is difficult to draw any intelligent conclusions as to whether the unions do or do not discriminate against blacks in their handling of grievances. Plaintiffs complain that the unions' records on grievances are filed by grievance number, rendering it exceedingly difficult to locate and verify particular grievances; rendering it exceedingly difficult to achieve the required racial analyses.

The unions contend that, while admittedly difficult, such information could have been derived from the unions' records, but plaintiffs failed to explore it. In my view, plaintiffs' generalized evidence concerning perceptions about racial inequities in the handling of grievances does not, without more, establish a prima facie case in this respect. I do not believe that any significant adverse inference can properly be drawn from the manner in which the union keeps its records pertaining to grievances.

In short, the evidence as a whole is inconclusive on this issue.

177. Plaintiffs are on firmer ground, however, with respect to the unions' repeated failures, during the limitations period, to include racial discrimination as a basis for grievances or other complaints against the company.

a. *Probationary Employees.* Under the terms of the collective bargaining agreement, the protections afforded probationary employees are quite limited; so much so, in fact, that the unions have pursued a uniform policy of not filing grievances on behalf of probationary employees, for any reason. Ever since 1965, however, the collective bargaining agreements have prohibited the company from discriminating against any employee, probationary or permanent, on racial grounds (*see, e.g.*, N.T. 24.97-99, 24.104-107).

The union knew that blacks were being discharged by Lukens at a disproportionately higher rate than whites (U-248; N.T. 14.58-59).

b. *Testing.* Although the unions did object to Lukens' use of tests of all kinds, the unions never based their opposition on the assertion that the tests had racially disparate impact, although the unions were certainly chargeable with knowledge that many of the tests, particularly the Wonderlic, were notorious in that regard. Instead, the unions argued only their traditional position (tests undercut the seniority principle, by favoring younger em-

ployees who have recently been in school over older employees whose formal education is more remote).

c. *Grievances.* It is undisputed that the unions were reluctant to assert racial discrimination as a basis for a grievance and almost never did so until after this suit was filed, even though many black employees asserting grievances complained about discriminatory treatment and harassment, and even though the union itself believed that racial discrimination was involved in the grievance. At first blush, the unions' explanation for this policy seems reasonable: In order to establish that a particular grievance had merit, it was necessary to establish a violation of the collective bargaining agreement. If such violation could be established, it was unnecessary to go further, and establish racial animus. And the company tended to "get its back up" and resist any charge of racial discrimination; or at least that was the union's perception of the company's position.

Upon reflection, however, I find this explanation unacceptable. In the first place, it overlooks the numerous instances of harassment, which were indisputably racial in nature, but which did not otherwise plainly violate a provision of the collective bargaining agreement. Thus, grievances involving no loss of pay or permanent disciplinary record were virtually ignored.

In the second place, it seems obvious that vigorous pursuit of claims of racial discrimination would have focused attention upon racial issues and compelled some change in racial attitudes. The clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment. In short, the unions' unwillingness to assert racial discrimination claims as such rendered the non-discrimination clause in the collective bargaining agreement a dead letter.

178. The unions argue that much of plaintiffs' case relates to discrimination in initial job assignments at

Lukens and that, since the collective bargaining agreements do not give the unions any voice in initial assignments, they can bear no legal responsibility for any such discrimination. It is true that the unions have no control over the hiring process; selection of employees is entirely the prerogative of management. But once employees are hired, they are entitled to the protections of the collective bargaining agreement; and one of those protections is a prohibition against racial discrimination. To require blacks to continue to work in lower paying and less desirable jobs, in units disparately black, is to discriminate against them in violation of the collective bargaining agreement (and, of course, also in violation of Title VII). It is very clear, on the record in this case, that the defendant unions never sought to avail themselves of this rather obvious mechanism for protecting the interests of their members.

Contrary to the union's arguments, mere union passivity in the face of employer-discrimination renders the unions liable under Title VII and, if racial animus is properly inferrable, under § 1981 as well. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976); *Maklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973); *Dickerson v. United States Steel Corp.*, 472 F. Supp. 1304, 1353-54 (E.D. Pa. 1978) and 439 F. Supp. 55, 62-63, 83 (1977).

Moreover, the evidence in this case proves far more than mere passivity on the part of the unions. The distinction to be observed is between a union which, through lethargy or inefficiency simply fails to perceive problems or is inattentive to their possible solution (in which case, at least arguably, the union's inaction has no connection with race) and a union which, aware of racial discrimination against some of its members, fails to protect their interests. A union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other

issues, or in deference to the perceived desires of its white membership, is liable under both Title II and § 1981, regardless of whether, as a subjective matter, its leaders were favorably disposed toward minorities.

XI. INDIVIDUAL CLAIMS

A. *Charles Goodman*

179. When hired by Lukens in 1965, named plaintiff Charles Goodman had had 11 years experience as an acetylene burner, and requested assignment to a burner job. He was assigned instead to a laborer's job in the pool. He claims, further, to have been arbitrarily and discriminatorily denied a transfer to an all-white subdivision (Central Stores) in 1966, and to have experienced discriminatory disciplinary treatment in the early years.

Most of these allegations involve pre-limitations events. Moreover, the record leaves open the possibility that no position as burner was open when Goodman was first employed, and that there may have been no openings in Central Stores when he sought transfer. The pre-limitations disciplinary incidents are not actionable here, and the evidence concerning them is sufficiently cloudy to preclude their consideration as background for post-discrimination matters.

180. Mr. Goodman suffered a heart attack, apparently some time in late 1969. In January 1970, he was permitted to transfer temporarily to the Plant Protection Department, as a security guard. It was standard practice for Lukens to permit employees who, by reason of physical disability, had difficulty performing the more strenuous work of the operating departments, to work as security guards in the Plant Protection Department. Most of the employees, and all of the supervisory personnel, in the Plant Protection Department were white.

Unfortunately, it was rather common for security guards to be caught napping while on duty. The evi-

dence as a whole leaves little doubt that such infractions by white guards were almost always overlooked, whereas such infractions on the part of black guards were likely to result in the imposition of discipline. During his tenure as a temporary guard, Mr. Goodman was twice warned about sleeping on the job, whereas more flagrant violations by white guards went unpunished.

Moreover, the two warnings Mr. Goodman received occurred in January and February 1971, some four months after he had been denied a permanent assignment to the Plant Security Department. In August and October 1970, Mr. Goodman was denied permanent assignment in that department, whereas four white employees, two of whom had less seniority than Goodman, were granted permanent assignments. Accordingly, Lukens' purported reliance upon the alleged sleeping incidents as a reason for turning down Goodman's promotion cannot be accepted.

I find that Charles Goodman was discriminated against on racial grounds in being denied a permanent assignment to the Plant Security Department.

181. Mr. Goodman also complains that his eventual discharge from employment at Lukens was discriminatory. His active employment at Lukens ceased in 1975, because of medical disability. He was finally terminated in 1978, because he failed to respond to a notice sent to him by the company. Mr. Goodman claims that he did not receive the notice, and this may be true; but it is clear that Lukens did send the notice to the address which Goodman had provided. In these circumstances, it is clear that Mr. Goodman has failed to establish that racial considerations entered into the discharge decision.

B. *Lymas Winfield*

182. In 1965, Lymas Winfield, at the suggestion of his black foreman, took a reading comprehension test, to

become eligible for training for the position of foreman. He was told by his white general foreman, George Wasko, that he had passed the test, and that he could become a permanent foreman after going to foreman school. However, Winfield was not admitted to the school.

183. In 1967, Winfield took a second test, similar to the first, and was again told that he had passed. He still was not placed in the school.

184. From 1965 through 1970, Winfield often worked as a temporary foreman, sometimes for as long as 27 weeks at a stretch. In August 1970, he asked Wasko whether he could become a permanent foreman, and was told that he would have to take another test because the test had been changed. Winfield checked at the Employment Office and learned that the foreman test had not been changed. When Wasko was confronted with this information, he told Winfield that he wanted to have a more recent score. Winfield therefore took the test for a third time. Winfield repeatedly asked Wasko about the results of the test, but for several months Wasko continued to state that he had not yet received the results. Eventually, Wasko told Winfield that he had passed the test and that Winfield would be sent to the first available foreman school. More than three years elapsed, however, before Winfield was sent to the foreman training school.

In the interim, Winfield encountered overt racial discrimination from a white salaried employee named Ted Corbo, whose job it was to tell Winfield what work was to be done by Winfield's crew. *Inter alia*, Corbo at one time stated that he was accustomed to dealing with "a different type of people than Winfield"; in context, this had racial connotations.

In early 1973, Winfield overheard Mr. Wasko tell another Lukens employee that Winfield was the best foreman he had. Shortly afterward, Winfield again asked

Wasko about being promoted to a permanent foreman position. Wasko stated that this would require the approval of the superintendent, Horace Potter, and that he would inquire. A few days later, Wasko called Winfield into his office and stated that he, Winfield, was the lousiest foreman he had ever had, and that his request for promotion was being denied.

About a week later, a white employee, Lou Anderson, was transferred into Winfield's gang for the express purpose of learning the job of turn foreman being performed by Winfield (Winfield had previously been informed that an employee was not permitted to transfer from one gang to another).

As a result of Winfield's discussion of his situation with a black official of the union, John Robinson, the matter was referred to the company-union Civil Rights Committee. A series of meetings followed, or were scheduled and not held, or were scheduled without Winfield's knowledge. These culminated in a "showdown" meeting with Mr. Ryan, Lukens' manager of labor relations. In the course of that meeting, Wasko stated, falsely, that Winfield had failed the foreman's test three times. Winfield suggested that someone immediately check with the Employment Office to verify the test results; although the Employment Office was open at the time, no check was made.

The outcome of the meeting was a decision that each of Winfield's supervisors would work closely with him for a week to learn what the job entailed and how he was performing. Compliance with this agreement was, however, spotty at best, and to some extent sabotaged by Mr. Wasko.

A few months later, Winfield became a named plaintiff in this lawsuit. Three months later, on September 18, 1983, Lukens official James Hall sent a "personal and confidential" memorandum to Norris Domangue, suggesting that Winfield should in fact be made a fore-

man "upon his graduation from the foremanship course. This is only a preliminary thought, however, which must be borne out by further investigation and, of course, discussion with our attorney."

In October 1973, Winfield was sent to foreman school, but continued to work as a temporary foreman.

Various other persons, some white and some black, became permanent foremen thereafter, but Winfield did not. In 1974, Winfield despaired of ever becoming a foreman, and refused to continue further as a temporary, choosing instead to return to a job in the labor gang. He began to drink to excess, and experienced various physical and psychological problems.

In December 1974, Winfield telephoned the Philadelphia EEOC office to explain the problems he had been having in his attempts to become a foreman, and was invited to come in for an interview. The very next morning, however, Lukens' newly appointed equal employment counselor approached Winfield, and asked if he had been in contact with the EEOC (although she did not state what occasioned the inquiry). She requested that he delay further contact with the EEOC for two weeks, so that she could attempt to adjust the matter in the interim. She stated that she believed Winfield would be offered the job of permanent foreman and, in fact, in January 1975, after 10 years as a temporary foreman, Winfield finally became a permanent foreman.

185. In a 1973 memorandum, Lukens employment supervisor James Hall, having investigated Winfield's complaints, expressed the conclusion that Winfield's superiors had displayed poor judgment and that "It . . . appeared there was a double standard of a sort." (P-1080.)

186. I find from the evidence as a whole that Lymas Winfield's promotion to the position of permanent fore-

man was delayed for at least eight years on racial grounds and, after the filing of this lawsuit, also in retaliation for his participation in this litigation.

C. *Romulus Jones*

187. Named plaintiff Romulus Jones was hired by Lukens in June 1969 as an accounting trainee in the Accounting Department of the comptroller's organization, having just graduated from Penn State University with a degree in accounting. He was then one of two blacks out of the approximately 45 employees in Lukens' main office building (the other black was a janitor). Ten years later, in November 1979, Jones and the janitor were still the only black employees in the building.

188. During this 10-year period, Jones was repeatedly passed over for promotion. At least seven white employees, many of them less senior, and none shown to be better qualified than Jones, received promotions.

The evidence undoubtedly establishes a *prima facie* case of racial discrimination in denial of promotions. Lukens has attempted to rebut plaintiffs' case by presenting evidence to the effect that Jones' job performance was only marginal. Indeed, the company suggests that, had he not been black, Jones would have been dismissed. The job-evaluations underlying this testimony were, however, all prepared after Jones complained to the EEOC. On balance, I reject these explanations as post-hoc rationalizations.

I find that Romulus Jones was discriminated against on racial grounds by being denied promotions.

D. *Dock L. Meeks*

189. Many of Mr. Meeks' complaints relate to the pre-limitations period. Except to the extent that relief is herein afforded to the plaintiff class, Meeks' complaints about discrimination in work-assignments, incentive pay,

scheduling, etc., do not persuade me that he is entitled to individualized relief in this case.

E. *John R. Hicks, III*

190. I have concluded that the named plaintiff John R. Hicks, III has not established a *prima facie* case of racial discrimination. His allegedly discriminatory treatment in the matter of discipline simply cannot stand, in the face of his deplorable record of absenteeism (approaching or exceeding 50%). If anything, the evidence tends to suggest discrimination against persons suffering from obesity, rather than racial discrimination.

F. *Ramon L. Middleton*

191. As noted above, I conclude that Ramon Middleton was discriminated against in being delayed entry to the Strand-Cast Unit, but I reject his claims relating to the "No. 1 operator" job.

G. *David Dantzler, Jr.*

192. At an earlier stage in this case, on October 9, 1979, I found that Mr. Dantzler had been discriminated against in disciplinary matters, and granted relief, including reinstatement with back pay. I remain persuaded that that disposition was correct, and conclude that no further individual remedy is due Mr. Dantzler in this case.

XII. CONCLUSIONS

1. The defendant Lukens Steel Company has discriminated against the plaintiff class, in violation of Title VII, during the limitations period applicable to this case, in the following respects:

a. Initial job assignments, including assignments to the pool as distinguished from seniority units, and to craft jobs as distinguished from non-craft jobs.

b. In promotions and/or transfers to better-paying craft jobs.

c. In denying incentive pay to employees in the Pits Subdivision.

d. With respect to discharges of employees during their probationary period.

e. With respect to promotions to salaried positions.

f. In its toleration of racial harassment.

2. In the same respects, defendant Lukens Steel Company has discriminated against the plaintiff class on racial grounds in violation of § 1981.

3. The defendant unions have discriminated against the plaintiff class on racial grounds, in violation of Title VII and § 1981, in the following respects:

a. Failure to challenge discriminatory discharges of probationary employees.

b. Failure and refusal to assert racial discrimination as a ground for grievances.

c. Toleration and tacit encouragment of racial harassment.

4. The named plaintiff Charles Goodman is entitled to relief against the defendant Lukens Steel Company for discriminatory denial of a permanent position in the Plant Protection Department.

5. Named plaintiff Lymas Winfield is entitled to relief against the defendant Lukens Steel Company for improperly denying him promotion to the position of permanent foreman.

6. Named plaintiff Romulus Jones is entitled to relief against the defendant Lukens Steel Company for discriminatory denial of promotions.

7. Named plaintiff Ramon Middleton is entitled to relief against the defendant Lukens Steel Company for discriminatory delay in his transfer to the Strand-Cast Unit.

8. In all other respects, the claims of the above-named plaintiffs, and of the other named plaintiffs, are dismissed, as to their claims for individual relief.

ORDER

AND NOW, this 13th day of February, 1984, it is ORDERED:

1. That judgment is entered in favor of the plaintiff class and against all defendants, on the issues of liability specified in the accompanying Opinion.

2. Judgment is entered in favor of the named plaintiffs Charles Goodman, Lyman Winfield, Romulus Jones, Ramon Middleton and David Dantzler, Jr., and against the defendant Lukens Steel Company only, on liability, as to the issues specified in the accompanying Opinion.

3. In all other respects, the individual claims of the named plaintiffs are DISMISSED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-1328

CHARLES GOODMAN, *et al.*

v.

LUKENS STEEL COMPANY, *et al.*

MEMORANDUM AND ORDER

FULLAM, J. August 2, 1984

By Opinion and Order entered February 13, 1984, the liability issues in this lawsuit have been determined, largely—but not entirely—favorably to plaintiffs' cause. Since that time the parties, and the court, have been engaged in attempts to chart the future course of this litigation. Basically, the defendants would prefer an immediate appeal of the liability determinations, and a stay of all further proceedings pending the outcome of the appeal. Not surprisingly, plaintiffs object to the prospect of this additional delay. There is undoubted merit in both positions.

The record is complete as to matters affecting class-wide injunctive relief, there is no reason to delay formulation of an injunctive decree, and an appeal from the grant of injunctive relief would permit appellate review of at least most of the basic liability determinations already made. Accordingly, an appropriate decree will be

entered, and the parties may pursue their appellate rights as they see fit.

The real issue is whether, and to what extent, the litigation should proceed pending appeal. In my view, given the inordinate delays which have already plagued this litigation, it would be most unreasonable to stay all further proceedings until the liability appeals are determined. Appropriate notice to the class members should not involve inordinate expense or difficulty, and many of the resulting individual claims would probably not require extensive additional discovery. At any rate, the process of further discovery can be closely monitored, so as to preclude the imposition of inordinate expense which might later prove to have been unnecessary.

It should also be mentioned that the parties apparently recognize the desirability of an amicable resolution of the entire controversy. Since the trial will be non-jury, I deem it inappropriate to participate in settlement discussions or proceedings. However, the parties will be encouraged to seek judicial assistance from one or more other members of this court to that end, if they desire.

In conformity with the foregoing views, I now enter three Orders: an injunctive order directed to the defendant Lukens Steel Company, an injunctive decree directed to the defendant unions, and an order with regard to further proceedings in the interim.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. ———

CHARLES GOODMAN, *et al.*

v.

LUKENS STEEL COMPANY, *et al.*

ORDER

AND NOW, this 2nd day of August, 1984, the court having considered the evidence presented at trial in this matter and the submissions of the parties, and in light of the liability determinations in this Court's Order and Opinion dated February 13, 1984, and for good cause appearing, it is ORDERED that:

1. Defendant Lukens Steel Company, Lukens Steel Company Division at its Coatesville plant ("Lukens"), is enjoined from discriminating against its black employees with respect to initial job assignments. In addition, Lukens is hereby ordered to do the following:

(a) maintain, in chronological order, the applications for employment of all those seekings jobs in the hourly workforce. Nothing herein shall obligate Lukens to keep applications on file for more than two years;

(b) as openings arise for entry-level positions, except for those positions which require special skill or training, contact applicants in the order in which they applied for employment, *i.e.*, a good-faith attempt should be made to first contact those indi-

viduals whose applications have been on file the longest;

(c) each individual contacted as set forth above shall be offered, in the order of their application, his/her choice of all available openings; and

(d) each quarter prepare a report setting forth, by race, the placement, both with respect to pool and non-pool positions and with respect to initial job grade for all non-pool positions, of all those hired during the preceding quarter. This report shall be available to counsel upon request.

2. Lukens is enjoined from discriminating against black employees with respect to promotion to craft jobs, and is specifically enjoined from relying upon any test not validated as job-related, in making hiring or promotional decisions. In addition, Lukens is ordered to do the following:

(a) designate one day a week as test day to permit any employee who has failed any test(s) for entry into the craft apprenticeship program to retake that test on test day. An employee shall be free to re-take the test(s) once a week for as many weeks as that employee desires. All employees who failed the test(s) shall be notified of their right to re-take the test and notified of any and all existing company tutoring programs;

(b) evaluate at least once a year the nature of craft jobs and the skills necessary to perform those jobs to assure that the content of any test(s) used for entry into the craft apprenticeship program are job-related; and

(c) each quarter prepare a report setting forth, by race, all those who have taken any test for entry into the craft apprenticeship program and all those individuals who have passed that test(s) during the

preceding quarter. This report shall be available to counsel upon request.

3. Lukens is enjoined from discriminating against black employees with respect to incentive pay to employees in the pits subdivision. In addition, Lukens is ordered to do the following:

(a) maintain a file of all incentive pay agreements and work preservation agreements currently in effect or, in the future, put into effect;

(b) make this file available to plaintiffs' counsel upon request; and

(c) notify plaintiffs' counsel of any changes in any incentive pay or work preservation agreement(s).

4. Lukens is enjoined from discriminating against black employees with respect to the discharge of employees during their probationary period. In addition, Lukens is ordered to do the following:

(a) promulgate written standards for the termination of probationary employees;

(b) require a written explanation of any recommendation to terminate a probationary employee;

(c) maintain a file of such recommendations and the action taken pursuant thereto; and

(d) each quarter prepare a report setting forth, by race, all employees terminated during their probationary period during the preceding quarter. This report shall be available to counsel upon request.

5. Lukens is enjoined from discriminating against black employees with respect to promotion to salaried positions. In addition, Lukens is ordered to do the following:

(a) post in at least one location easily accessible to the hourly workforce all entry level salaried positions. This posting shall include, at a minimum, the

following information: (i) a general description of the duties of the position; (ii) a general description of the skill and experience requirements, if any, and (iii) where and how to apply for the posted position; and

(b) each quarter prepare a report setting forth, by race, all employees promoted from the hourly to the salaried workforce during the preceding quarter. This report shall be available to counsel upon request.

6. Lukens is enjoined from discriminating against blacks by toleration of racial harassment. In addition, Lukens is ordered to do the following:

(a) promulgate written rules to prevent such conduct by its employees which shall specify the prohibited conduct and the applicable penalties for such conduct; and

(b) each quarter prepare a report listing all complaints of racial harassment made by employees and the action taken with respect to those complaints, including all penalties assessed. This report shall be available to counsel upon request.

7. This Order shall remain in full force and effect for five years unless earlier modified or dissolved.

/s/ John P. Fullam
FULLAM
U.S.D.J.

APPENDIX E

Civil Action No. 73-1328

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES GOODMAN, *et al.*
Plaintiffs,

v.

LUKENS STEEL COMPANY, *et al.*
Defendants.

ORDER

Based upon the liability determinations contained in this Court's opinion and order of February 13, 1984, and after consideration of the submissions of the parties with respect to the appropriate injunction to issue with respect to the violations found in that opinion, IT IS HEREBY ORDERED, this 2nd day of August, 1984, that:

1. Defendant United Steelworkers of America and defendants Local 1165 and Local 2295 of the Steelworkers (collectively referred to as "the defendant unions") are enjoined from discriminating against black employees of Lukens Steel Company ("Lukens") by failing to challenge discriminatory discharges of probationary employees. To effectuate this injunction, it is further ordered that:

(a) The defendant unions shall prepare a written notice informing probationary employees of the fact that the collective bargaining agreement between Lukens and the Unions prohibits Lukens from discharging probationary employees based upon their race or color, and advising any probationary employee who is discharged

and who believes his discharge to be racially discriminatory to contact the chairman of the grievance committee for the local having jurisdiction over that probationary employee's job. The defendant unions shall furnish copies of this notice to defendant Lukens which shall, in turn, give a copy of the notice to each new bargaining-unit employee who is hired by Lukens.

(b) The defendant unions shall prepare written guidelines for the handling of complaints of racial discrimination by a discharged probationary employee. These guidelines shall include at least the following provisions:

(i) To insure centralized control and recordkeeping, all complaints of racial discrimination by a discharged probationary employee shall be referred to the chairman of the grievance committee.

(ii) Upon receiving a complaint of discrimination by a discharged probationary employee, the grievance committee chairman shall create a written record indicating the name of the complainant, the date of the complaint, and the basis offered for the complaint. A copy of this document shall be furnished to the union co-chairman of the Company-Union Civil Rights Committee and to the International Staff Representative assigned to service the Local.

(iii) The grievance committee chairman shall make a written notation in the record he is maintaining of the disposition of the complaint. The complainant shall have the right to receive a copy of the chairman's record and to review the chairman's decision with the International Staff Representative assigned to service the Local.

(c) A copy of the guidelines required to be created by subparagraph (b) shall be given to each grievance committeeman, assistant grievance committeeman, and shop steward, and shall be posted at the local union hall. In addition, the defendant unions shall provide a training session for all grievance committeemen, assistant griev-

ance committeemen, and shop stewards concerning the handling of complaints of racial discrimination by discharged probationary employees.

(d) Counsel for plaintiffs shall be entitled, upon request (but not more often than quarterly), to receive a copy of any record maintained by the chairman of the grievance committee pursuant to this paragraph.

2. The defendant unions are enjoined from discriminating against black employees of Lukens by failing or refusing to assert meritorious claims of racial discrimination as a ground for grievances or other complaints. To effectuate this injunction it is further ordered that:

(a) The defendant unions shall prepare written guidelines for the handling of complaints of racial discrimination. These guidelines shall include at least the following provisions:

(i) To insure centralized control and recordkeeping, all complaints of racial discrimination shall be referred to the chairman of the grievance committee.

(ii) Upon receiving a complaint of discrimination, the grievance committee chairman shall create a written record indicating the name of the complaint, the date of the complaint, and the basis offered for the complaint. A copy of this document shall be furnished to the union co-chairman of the Company-Union Civil Rights Committee and to the International Staff Representative assigned to service the Local.

(iii) The grievance committee chairman shall make a written notation in the record he is maintaining of the disposition of the complaint. The complainant shall have the right to receive a copy of the chairman's record and to review the chairman's decision with the International Staff Representative assigned to service the Local.

(b) A copy of the guidelines required to be created by subparagraph (a) shall be given to each grievance com-

mitteeman, assistant grievance committeeman, and shop steward, and posted at the local union hall. In addition, the defendant unions shall provide a training session for all grievance committeemen, assistant grievance committeemen, and shop stewards concerning the handling of complaints of racial discrimination.

(c) Counsel for plaintiffs shall be entitled, upon request (but not more often than quarterly), to receive a copy of any record maintained by the chairman of the grievance committee pursuant to this paragraph.

3. The defendant unions are enjoined from discriminating against black employees of Lukens by tolerating or giving tacit encouragement to racial harassment. To effectuate this injunction it is further ordered that:

(a) The defendant unions shall cause to be posted on bulletin boards throughout the plant and at the local union hall a statement that (i) racial harassment violates both state and federal law; (ii) the defendant unions are committed to oppose racial harassment; and (iii) any Lukens employee who feels that he or she has been subjected to racial harassment is encouraged to present the complaint to the union co-chairman of the company-union civil rights committee.

(b) The defendant unions shall prepare written guidelines for the handling of complaints of racial harassment. These guidelines shall include at least the following provisions:

(i) To insure centralized control and recordkeeping, all complaints of racial harassment shall be referred to the union co-chairman of the civil rights committee.

(ii) Upon receiving a complaint of racial harassment, the civil rights committee chairman shall create a written record indicating the name of the complaint, the date of the complaint, and the basis offered for the complaint. A copy of this document shall be furnished to the

International Staff Representative assigned to service the Local.

(iii) The chairman of the civil rights committee shall make a written notation in the record he is maintaining of the disposition of the complaint. The complainant shall have the right to receive a copy of the chairman's record and to review the chairman's decision with the International Staff Representative assigned to service the Local.

(c) A copy of the guidelines required to be created by subparagraph (b) shall be given to each grievance committeeman, assistant grievance committeeman, and shop steward, and posted at the local union hall. In addition, the defendant unions shall provide a training session for all grievance committeemen, assistant grievance committeemen, and shop stewards concerning the handling of complaints of racial harassment.

(d) Counsel for plaintiffs shall be entitled, upon request (but not more often than quarterly), to receive a copy of any record maintained by the chairman of the civil rights committee pursuant to this paragraph.

4. This injunction shall continue for five years from the date of its entry unless earlier modified or vacated.

/s/ John P. Fullam
U.S. DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1478 & 84-1509

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., AND LYMANS L. WINFIELD, on their own behalf and on behalf of others simliarly situated,

and

UNITED POLITICAL ACTION COMMITTEE, an unincorporated association, DOCK MEEKS, DAVID DANTZLER, JOHN HICKS, III, individually and on behalf of all others similarly situated

v.

LUKENS STEEL COMPANY, and INTERNATIONAL STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO)

United Steelworkers of America, AFL-CIO-CLC, and its Local Unions 1165 and 2295, Appellants in 84-1478

Lukens Steel Company, Appellant in 84-1509

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 73-1328)

Present: WEIS, GARTH, and STAPLETON, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel June 11, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered February 13, 1984, and August 7, 1984, be, and the same are hereby vacated insofar as the findings that Lukens discriminated in transfers to salary positions and tolerance of racial harassment and the cause remanded to the said District Court for further consideration of these matters in light of this Court's ruling on the appropriate statute of limitations for the § 1981 claims.

It is further ordered and adjudged that the said District Court's finding in favor of the class with respect to initial assignments will be vacated and the cause remanded for reconsideration in light of this Court's ruling on class representation.

It is further ordered that on remand the limitations period pertaining to the Title VII claims against the unions shall be adjusted in accordance with the opinion of this Court.

It is further ordered and adjudged that the finding of discrimination in the denial of incentive pay for the pit crew is reversed and it is directed that on remand that judgment be entered for the defendant on that claim.

All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Sally Mrvos
Clerk

November 13, 1985

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 84-1478 & 84-1509

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., AND LYMAS L. WINFIELD, on their own behalf and on behalf of others similarly situated,

and

UNITED POLITICAL ACTION COMMITTEE, an unincorporated association, DOCK MEEKS, DAVID DANTZLER, JOHN HICKS, III, individually and on behalf of all others similarly situated

v.

LUKENS STEEL COMPANY, and INTERNATIONAL STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO)

United Steelworkers of America, AFL-CIO-CLC, and its Local Unions 1165 and 2295, Appellants in 84-1478

Lukens Steel Company, Appellant in 84-1509

(D.C. Civ. No. 73-1328)

SUR PETITION FOR PANEL REHEARING

Present: WEIS, GARTH and STAPLETON, *Circuit Judges.*

The petition for panel rehearing filed by appellants United Steelworkers of America, AFL-CIO-CLC, and Local Unions 1165 and 2295 in the above entitled case having been submitted to the judges who participated in the decision of the court, and after consideration of said petition, it is

ORDERED that the petition for panel rehearing is denied.

BY THE COURT,

/s/ Weis
Circuit Judge

DATED: January 7, 1986

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1478 & 84-1509

CHARLES GOODMAN, *et al.*,
Plaintiffs-Appellees

v.

LUKENS STEEL COMPANY, and INTERNATIONAL STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO),
Defendants-Appellants

(D.C. Civ. No. 73-1328)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges.*

The petition for rehearing filed by Plaintiffs-Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Gibbons would grant rehearing in banc.

Judges Garth and Becker would grant rehearing in banc only with respect to the statute of limitations issue. Judge Garth's Statement Sur Petition for Rehearing is attached hereto.

BY THE COURT,

/s/ Joseph F. Weis, Jr.
Circuit Judge

DATED: January 7, 1986

STATEMENT OF JUDGE GARTH SUR PETITION FOR REHEARING

I would grant rehearing only on the issue of whether actions pursuant to 42 U.S.C. § 1981 must be governed by a uniform personal injury statute of limitations as are actions pursuant to § 1983 under the rule of *Wilson v. Garcia*, 105 S. Ct. 1938 (1985). I believe the panel majority in this case wrongly decided this question for three reasons.

First, on its face, *Wilson v. Garcia* only governs actions under § 1983. Even a moderately expansive reading of *Wilson* would require only that *each section* of the Reconstruction civil rights acts be governed by an appropriate, uniform statute of limitations. The *Wilson* court focused on the history, purpose, and application of § 1983 in concluding that actions under *that section* are most appropriately governed by a state's personal injury limitation period. *Wilson* therefore does not control the disposition of the present case.

Second, the history, purpose, and application of § 1981 reflects that the section was conceived and has been applied primarily as a means of protecting *economic* rights, such as those involving labor, property, and contracts. As such, § 1981 is best governed by the longer statute of limitations provided in most states for actions in contract.

Third, the "uniformity" sought by the panel majority in the application of the civil rights laws is nothing less than chimerical. It is quite common for a complaint to join causes of action governed by different statutes of limitations—whether the joined claims involve tort and contract, federal civil rights claims and state claims, or § 1981 and § 1983 claims. Different statutes of limitation are applied because different sorts of interests are protected by the different provisions, and the states have made policy choices in balancing rights against the practical problems of trying stale claims.

Most states have concluded that economically grounded causes of actions will more frequently arise from patterned and well-documented courses of conduct than will claims for personal injury, and that it is therefore fair to bring such economic claims up to six years after they arise. There is no reason we should not respect these policy choices, grounded as they are in real and substantial differences between and among causes of action, in applying civil rights statutes which reflect the same differences.

I have more fully set out these reasons with supporting authorities in my dissent from the panel opinion. I have voted to grant rehearing here because I believe that this issue will arise with great frequency in cases brought before the federal courts. Thus, the majority's holding will have far-reaching consequences by unjustifiably barring many cases brought under § 1981 through the

application of a shorter personal injury statute of limitations.

Because of the importance of this question, I believe full court consideration is warranted.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 84-1478 & 84-1509

CHARLES GOODMAN, *et al.*

vs.

LUKENS STEEL CO., *et al.*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until February 11, 1986.

/s/ Weis
Circuit Judge

Dated: January 9, 1986

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 84-1478 and 84-1509

UNITED STEELWORKERS OF AMERICA, ETC.,
Appellants in No. 84-1478

vs.

LUKENS STEEL COMPANY, ETC.,
Lukens Steel Company,
Appellant in No. 84-1509

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until April 7, 1986.

/s/ Weis
Circuit Judge

Dated: February 3, 1986

APPENDIX K

SUPREME COURT OF THE UNITED STATES

No. A-718

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *et al.*,
Applicants,

v.

CHARLES GOODMAN, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 6, 1986.

/s/ William J. Brennan
Associate Justice of the
Supreme Court of the
United States

Dated this 18th day of March, 1986.

Supreme Court, U.S.
FILED
JUL 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2010

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; LOCAL UNION 1165, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; and LOCAL UNION 2295, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, DOCK MEEKS, DAVID DANTZLER, JR., and JOHN R. HICKS, III, Individually and on behalf of all others similarly situated, and UNITED POLITICAL ACTION COMMITTEE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

William H. Ewing
Arnold P. Borish*
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16 pp

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether a union which is aware of widespread employer racial discrimination against its black members violates Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 by deliberately choosing not to enforce non-discrimination clauses contained in its collective bargaining agreement, where that choice serves to perpetuate a discriminatory environment.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-2010

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; LOCAL UNION 1165, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; and LOCAL UNION 2295, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, DOCK MEEKS, DAVID DANTZLER, JR., and JOHN R. HICKS, III, Individually and on behalf of all others similarly situated, and UNITED POLITICAL ACTION COMMITTEE,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

After a 32-day trial, the United States District Court for the Eastern District of Pennsylvania held Lukens Steel Company liable under Title VII and 42 U.S.C. § 1981 for intentional discrimination against its black employees as a class in a wide range of employment practices: initial assignment at hire, discharge during the probationary period, promotion to

craft positions, promotion to salaried positions, toleration of racial harassment, and denial of incentive pay to employees in the predominately black "Pits" seniority unit.

The District Court also found that the United Steelworkers of America and its Local Unions 1165 and 2295, the bargaining agents for hourly employees at Lukens, had intentionally discriminated against their black members at Lukens by failing to enforce the non-discrimination provisions in their collective bargaining agreement. The District Court found that the Petitioners had intentionally (1) failed to challenge the discriminatory discharges of probationary employees, (2) failed and refused to assert racial discrimination as a ground for grievances, and (3) tolerated and tacitly encouraged racial harassment. App. at 146a-147a. The District Court stated:

> The clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment. In short, the unions' unwillingness to assert racial discrimination claims as such rendered the non-discrimination clause in the collective bargaining agreement a dead letter.

App. at 138a.

Although the District Court agreed with other courts which have held that "mere union passivity in the face of employer-discrimination renders the unions liable under Title VII and, if racial animus is properly inferrable, under § 1981 as well," App. at 139a (citations omitted), the court did *not* base its decision on that ground. Rather, it found as follows:

> *[T]he evidence in this case proves far more than mere passivity on the part of the unions.* The distinction to be observed is between a union which, through lethargy or inefficiency simply fails to perceive problems or is inattentive to their possible solution (in which case, at least arguably, the union's inaction has no connection with race) and a union which, aware of racial discrimination against some of its members, fails to protect their inter-

> ests. *A union which intentionally avoids asserting discrimination claims*, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under both Title VII and § 1981, regardless of whether, as a subjective matter, its leaders were favorably disposed towards minorities.

App. at 139a-140a (emphasis added).

The United States Court of Appeals for the Third Circuit affirmed the District Court's findings against Lukens with respect to discrimination in discharge of employees on probation and in promotions to craft positions and all the District Court's findings against the unions. The Court of Appeals vacated the District Court's findings of discrimination by Lukens in promotion to salaried positions and toleration of racial harassment, and it remanded the case to the District Court for reconsideration of those findings in light of the Court of Appeals' ruling that the proper limitations period for Section 1981 claims was two years, rather than the six-year period applied by the District Court.[1] The Court of Appeals also held that none of the named plaintiffs had standing to assert the claims of discrimination in initial assignment, and it remanded those claims for the District Court to consider the possibility of intervention by other class members to represent the class on those claims.[2] Finally, the Court of Appeals reversed the District Court's finding that Lukens' denial of incentive pay to employees in the "Pits" seniority unit was racially discriminatory.

In affirming the District Court's findings of intentional discrimination by the Petitioners, the Court of Appeals stated:

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1. The Court of Appeals' holding on the applicable statute of limitations is the subject of a pending Petition for Certiorari by the plaintiffs, captioned *Goodman v. Lukens Steel Company*, No. 85-1626.

2. The Court of Appeals' remand on this issue and certain other aspects of its decision are subjects of a Petition for Certiorari by Lukens captioned *Lukens Steel Company v. Goodman*, No. 85-1645.

> The case against the unions here is stronger than mere acquiescence. The district court found that *the unions intentionally avoided asserting claims of discrimination.... The deliberate choice not to process grievances [based on discrimination] ... violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation*. The district court's finding of intentional discrimination properly supports the claims under § 1981 as well. We therefore find no error in the district court's assessment of liability against the unions.

App. at 26a-27a (emphasis added).

The evidence upon which these findings were based proved that the union defendants showed two faces to the world. On the national public policy level, the United Steelworkers had been leaders in the fight for civil rights. As early as 1962 the International Union had negotiated a non-discrimination clause in the national collective bargaining agreement which served as the pattern for the Lukens agreement. Subsequently, provisions prohibiting racially biased tests and prohibiting racial discrimination in the discharge of probationary employees were added to the national collective bargaining agreement and the Lukens agreement.

At Lukens, however, Local Unions 1165 and 2295 and the representatives of the International Union who worked with them on contract negotiations and grievance processing had deliberately decided not to enforce the collective bargaining provisions against discrimination. Indeed, in reviewing pre-limitations-period events by way of background (but not as a ground for relief), the District Court found that the 1962 industry-wide non-discrimination clause was not even included in the Lukens collective bargaining agreement negotiated that year; it was not added until 1965, when the *company* rather than the unions suggested it be added. App. at 133a-134a.

As the District Court found, the unions never challenged a discharge of an employee during his probationary period

although the collective bargaining agreement specifically prohibited racial discrimination in such discharges, and the unions "knew that blacks were being discharged by Lukens at a disproportionately higher rate than whites." App. at 137a. Moreover, the unions never objected to Lukens' tests as racially discriminatory, "although the unions were certainly chargeable with knowledge that many of the tests, particularly the Wonderlic, were notorious in that regard." *Id.* Finally, with respect to the general contractual non-discrimination clause (which was belatedly added to the collective bargaining agreement in 1965), the District Court found:

> It is undisputed that the unions were reluctant to assert racial discrimination as a basis for a grievance and almost never did so until after this suit was filed, even though many black employees asserting grievances complained about discriminatory treatment and harassment, and even though the union itself believed that racial discrimination was involved in the grievance.

App. at 138a.

The District Court found that this conduct was intentional. It did not fault the unions for failing to succeed in eliminating racial discrimination at Lukens but rather for deliberately deciding not to try to enforce the provisions of the collective bargaining agreement which were adopted for the benefit of minority employees.

REASONS FOR DENYING THE WRIT

The fundamental flaw in the Petitioners' argument is its disregard of three crucial facts, found by the District Court and affirmed by the Court of Appeals: (1) The applicable collective bargaining agreement contained three clauses explicitly prohibiting discrimination on the basis of race by Lukens, and (2) the Petitioners were aware of such discrimination by Lukens, but (3) the Petitioners deliberately decided not to file grievances for violations of the non-discrimination clauses. Thus, the holdings of the courts below were based on

the unions' intentional avoidance of enforcement of their contractual non-discrimination clauses, *not* on any theory that the unions had a legal duty, apart from their contract, to object to employer discrimination. This avoidance, in the words of the District Court, "rendered the non-discrimination clause in the collective bargaining agreement a dead letter." App. at 138a.

These holdings on "ultimate questions of fact," *United States Postal Service v. Aikens*, 460 U.S. 711, 716 (1983), can be set aside only if they are "clearly erroneous." See *Anderson v. City of Bessemer City*, 105 S.Ct. 1504, 1512 (1985). The Petitioners do not claim that they were "clearly erroneous."

The Petitioners have conceded the legal basis for the District Court's decision. Their Petition states as follows:

> A union cannot control management; it can affect management's conduct in running the business only to the extent that it can secure collective bargaining agreements that limit these managerial powers. A union cannot prevent employer discrimination that violates Title VII unless it negotiates for contract provisions that would prohibit management from engaging in practices that violate that law. *And, if it succeeds in obtaining any such contract provisions, it must then expend its resources in the grievance/arbitration procedure to enforce those provisions.*

Petition at 22 (emphasis added).

The holding of the District Court and the affirmance by the Court of Appeals were clearly based on the finding that, although the collective bargaining agreement contained three specific prohibitions of racial discrimination, the unions made a "deliberate choice," App. at 26a, not to "expend [their] resources in the grievance/arbitration process to enforce those provisions." This deliberate choice not only violated the unions' duty of fair representation and their duty to enforce the collective bargaining agreement; it also intentionally discriminated against the black and other minority employees

whom the non-discrimination provisions were intended to protect. *Id.* A union which decides to sacrifice enforcement of non-discrimination provisions "either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white members," App. at 139a-140a, discriminates against its black members. As this Court held in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976):

> The same reasons which prohibit an employer from discriminating on the basis of race among . . . employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them.

427 U.S. at 285.

The Petitioners' reliance on *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1982), is misplaced because the unions in the present case were found to have the discriminatory intent of which the employers in *General Building Contractors* were innocent. This Court lucidly phrased the issue and its conclusion in *General Building Contractors* as follows:

> The District Court held petitioners liable under § 1981 notwithstanding its finding that *the plaintiffs had failed to prove intent to discriminate on the part of the employers and associations as a class*. In light of our holding that § 1981 can be violated only by intentional discrimination, the District Court's judgment can stand only if liability under § 1981 can properly rest on some ground other than the discriminatory motivation of the petitioners themselves. Both the District Court and respondents have relied on such grounds, but we find them unconvincing.

458 U.S. at 391 (emphasis added).

By contrast, the District Court in the present case found

that the Petitioners had intentionally avoided enforcing the three provisions of the collective bargaining agreement which prohibited discrimination by Lukens, even though they were aware that such discrimination existed.

Section 1981 explicitly guarantees to "all persons within the jurisdiction of the United States . . . the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . ." As the Petitioners themselves acknowledge, "unions have the exclusive right to enforce" rights that are embodied in collective bargaining agreements and, accordingly, "are subject to the duty of fair representation, which obligates them to act fairly in exercising their enforcement responsibility." Petition at 20-21. As the District Court found, the Petitioners in the present case deliberately decided not to fulfill their duty to enforce their black members' contractual rights to freedom from discrimination.

Unlike the District Court in *General Building Contractors*, the District Court in the present case did not make the Petitioners "the guarantors of the workers' rights as against third parties who would infringe them." 458 U.S. at 396. It did not hold the Petitioners liable for failure to eradicate discrimination by Lukens; it held them liable only for intentionally refusing to file grievances based on the nondiscrimination clauses in the collective bargaining agreement and thus denying their black employees the right to equal enforcement of that contract.

CONCLUSION

Because the holdings of the District Court and the Court of Appeals were based on the Petitioners' intentional and deliberate refusal to enforce non-discrimination clauses in the collective bargaining agreement, this case does not offer a vehicle for the Court to decide whether Title VII or Section 1981 by itself imposes an affirmative duty on unions to make efforts to prevent employer discrimination. The Petitioners do not claim that the District Court's decision was "clearly erroneous" in holding that the Petitioners' decision was intentional, served to perpetuate the discriminatory environment, and rendered the non-discrimination clause a "dead letter." Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 85-2010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; LOCAL UNION 1165, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; and LOCAL UNION 2295, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, DOCK MEEKS, DAVID DANTZLER, JR., and JOHN R. HICKS, III, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, and UNITED POLITICAL ACTION COMMITTEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF

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42 U.S.C. § 1981 ..... 1, 6, 8

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REPLY BRIEF

The petition for certiorari demonstrated that the decision below rests on the controversial legal theory—as to which the Courts of Appeals are in conflict—that Title VII and 42 U.S.C. § 1981 impose on unions a duty to make affirmative efforts to prevent employers from discriminating. It also demonstrated that the sole factual basis on which the courts below found the petitioner unions liable on this theory was the district court's finding that, in filing grievances against the employer's alleged discriminatory actions, the unions made the arguments that they thought were most likely to win the individual grievances, rather than explicit arguments of race discrimination under the contractual non-discrimination clauses. The petition for certiorari also demonstrated that both the underlying legal theory and this particular application of it are fundamentally at odds with the national labor policy as expressed in federal statutes and this Court's decisions, and that the issue is an important one that merits review by this Court.[1]

[1] After the petition was filed in this case the Court denied a petition for certiorari presenting the same legal issue as the first

Respondents do not dispute the petition's showing that there is a conflict in the circuits over this theory of union liability, or that it is an important issue of federal labor policy. In addition, respondents acknowledge—in their rephrasing of the Question Presented—that the only factual basis for the judgment of liability below was the finding that the unions had intentionally framed grievances on grounds other than the collective bargaining agreement's non-discrimination clauses. Nonetheless, respondents attempt to evade certiorari by trying to make this case appear to be something other than what it is, and trying to make it appear that the decision below rests on something other than the controversial legal theory that unions have a duty to act affirmatively to prevent employer discrimination.

1. Despite respondents' attempts to recast the district court's findings, this is not a case in which the unions treated black and white employees unequally in grievance representation. At trial respondents tried to prove that there was a pattern of discriminatory representation in the grievance process, but the district court rejected that claim. (App. at 135-137a). Respondents did not appeal from the district court's finding of fact on that issue.

Nor is this a case of a union that failed to challenge employer discrimination. Respondents tried to prove a general claim of union "passivity" with regard to discrimination by the employer, but the undisputed evidence showed that the unions had made extensive efforts to stop or prevent the employer from engaging in discriminatory practices, including both negotiating for contract provisions that precluded employer discrimination and attempting to enforce the contract on behalf of black employees complaining of discriminatory acts. (*See* Pet. at 5-6). Accordingly, the district court found a "passivity" viola-

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Question Presented in this petition. *International Molders Union v. Howard*, No. 85-1629, *cert. denied*, 106 S. Ct. 2902 (1986). The order denying certiorari in *Howard* noted that Justices Brennan, White, and Marshall had voted to grant certiorari. *Id.*

tion *only* with respect to the unions' preference for framing grievances on contractual grounds other than explicit allegations of race discrimination. (App. 137a, 138a).[2]

What the decision below rests on is nothing more than the lower courts' disagreement with the unions' strategic judgment about the best way to combat employer discrimination. Undisputed evidence at trial established that there were many provisions in the collective bargaining agreement, apart from the non-discrimination clauses, that effectively prevented discrimination. For example, the agreement provided that seniority would determine many employment decisions, including promotions and transfers. When the employer tried to select someone other than the senior employee, it had to justify that selection based on objective factors such as demonstrated superior ability on the part of the junior employee.[3] Union representatives testified that when they had such a contractual basis for a black employee's grievance, they could win the grievance without having to prove that the employer's decision was motivated by race. They also testified that in their experience allegations of race discrimination were often counterproductive and made it harder for them to win the relief the individual grievant

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[2] Respondents also emphasize the fact that the unions succeeded in obtaining a general non-discrimination clause in 1962 from the largest steel companies that took part in national bargaining, but did not obtain the same clause at Lukens until 1965. (Brief in Opp. at 4). The district court reviewed this evidence, but did not find that it constituted evidence of any discriminatory animus or other improper motive on the part of the unions. (App. 133a-134a). Moreover, the district court understood—though respondents apparently have forgotten—that evidence of what happened in the 1962 negotiations, before Title VII was even enacted, could not provide any basis for liability in this case. (*Id.*).

[3] Another example of such a contractual provision is the requirement of "just cause" to support the discipline or discharge of a non-probationary employee. Management must justify any such disciplinary action with objective evidence of misconduct or other legitimate reasons. If there is no such evidence, "just cause" will not be found.

wanted. Moreover, the record contained a number of examples in which the unions had made a tactical judgment to base a black employee's grievance on grounds other than an explicit allegation of discrimination, and in which they had succeeded in winning all the relief that the employee wanted.

The district court did not find that the unions were wrong from a tactical standpoint in making these judgments; it did not find that individual grievances would have fared better (or even as well) if explicit allegations of race discrimination had been made. Indeed, the court credited the union representatives' testimony as to why the unions were "reluctant" to file grievances expressly alleging discrimination (App. 138a). Nonetheless, the court held that the unions violated the law by making this choice, because vigorous assertions of discrimination claims "would have focused attention on racial issues and compelled some change in racial attitudes." (*Id.*). Thus, in the district court's view, the unions' failure to pursue the course of action that the court preferred "served to perpetuate the discriminatory environment." (*Id.*). In short, the district court disagreed with the unions' priorities and held that the unions were obliged to pursue a strategy designed to produce global changes in the employer's "racial attitude" even if that strategy diminished the chances of getting complete and speedy remedies for individual acts of discrimination.

The court of appeals affirmed on precisely the same ground, relying entirely on the findings of the district court. The legal theory that supports the judgment is therefore nothing other than the unions' supposed duty to make affirmative efforts to prevent employer discrimination and, indeed, an even more troubling variant of that theory that requires the unions to make the particular efforts that a court believes would have had the broadest impact on discrimination.

The district court's "dead letter" finding, which respondents quote twice, was made in this same context.

Having just found that by not "vigorous[ly]" pressing explicit race discrimination claims the unions had missed an opportunity to change the company's attitude and had therefore "served to perpetuate the discriminatory environment," the district court found that "the unions' unwillingness to assert racial discrimination claims *as such* rendered the non-discrimination clause in the collective bargaining agreement a dead letter." (App. 138a; emphasis added). This finding expresses nothing more than the district court's disagreement with the unions' tactical judgment to rely when possible on other contract clauses in preference to the non-discrimination clauses.[4]

The issue pertaining to the employer's written tests fully illustrates the lower courts' theory. Respondents describe the facts in a way that suggests the unions never objected to those tests. (Brief in Opp. at 5). The district court, however, found (based on volumes of undisputed evidence) that "the unions did object to [the employer's] use of tests of all kinds"; the only fault found was that "the unions never based their opposition on the assertion that the tests had racially disparate impact." (App. 137a). The district court thus held that this was another tactical judgment that the unions were not permitted to make. But the undisputed evidence plainly shows that on the issue of testing, a showing of racially disparate impact was unnecessary. The testing provisions of the collective bargaining agreement—unlike Title VII—prohibited the use of all tests that were not job-related, regardless of whether they also had a disparate impact. Thus, while under Title VII as interpreted in *Griggs v.*

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[4] In their description of the findings and decisions below, respondents recite that the district court held that the unions had "tolerated and tacitly encouraged racial harassment." (Brief in Opp. at 2). They fail to note that this ruling was based, like all of the other liability rulings with respect to the unions, solely on the unions' failure to file grievances arguing discrimination "as such." (*See* Pet. at 8-9 n.5). And, in any event, this liability ruling was vacated by the court of appeals as a result of its decision on the statute of limitations. (*Id.*).

Duke Power Co., 401 U.S. 424 (1971), a test is not prohibited unless it both has a disparate impact and is not job-related, the unions could stop the use of a test under the contract based solely on proof that the test was not job-related. Moreover, the undisputed evidence at trial was that the International Union had been uniformly successful throughout the steel industry in getting rid of written tests solely by prosecuting grievances based on the job-related issue, without having to undertake the additional burden of proving that the tests also had a disparate impact. It was also undisputed that this strategy had been developed and was being implemented by a black official who was Director of Arbitration for the International Union. Yet, despite the union's success, the lower courts held that it was unlawful to pursue this strategy for eliminating non-job-related tests.

2. Respondents also try to make this case appear to be one in which the unions completely failed to enforce black employees' contractual rights to be free of employer discrimination. (*See, e.g.*, Brief in Opp. at 4, 5-6, 8). Even if what respondents suggest is true, it would not change the underlying legal theory or the importance of granting plenary review in this case. The judgment below does not rest on any theory that the unions breached a *contractual* duty owed to black employees. It rests entirely on the lower courts' understanding that Title VII and Section 1981 require unions to take specific affirmative actions to prevent employer discrimination. And that understanding, as the petition showed, is at odds with both the statutes and the national labor policy.

In any event, in suggesting that the unions completely failed to enforce black employees' contractual rights to be free of discrimination, respondents have distorted the district court's findings and the record. As we already noted, many provisions of the contract other than the explicit non-discrimination clauses operated to prohibit discrimination. The district court did not find that by relying chiefly on these other provisions of the contract,

the unions had left black employees unrepresented on the subject of discrimination. On the contrary, the district court made explicit findings that in many areas of alleged discrimination the unions' grievance representation—albeit based largely on contract clauses other than the express non-discrimination clauses—had effectively protected black employees from employer discrimination. (Pet. at 7; App. 91a, 93a, 101a). Moreover, as we already discussed, the testimony regarding the unions' preference for using these other clauses explained that the unions' purpose was to choose the strategy that was most likely to obtain relief for the individual black employee who was complaining about employer discrimination. The record and findings thus show that both the intent and the effect of the unions' actions were to represent individual black grievants and obtain the best possible result for them.[5]

3. Respondents also assert that the unions' preference for not making explicit allegations of race discrimination in grievances amounted to racial discrimination against black employees. (Brief in Opp. at 6-7). No doubt, there could be cases in which unions, in choosing not to make arguments of discrimination, treated black and white grievants differently or were motivated by racial animus. If so, discrimination would be properly found. But this is not such a case. The findings of fact are inconsistent with respondents' assertion of discrimination.

As we already noted, the district court rejected respondents' claim that the unions' handling of grievances

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[5] In addition, the undisputed evidence revealed approximately two dozen instances within the original limitations period—chiefly cases in which there was no contract clause to rely on except the non-discrimination clauses—in which the unions did file a grievance or other formal complaint expressly alleging discrimination. Because of that evidence the district court did not find that the unions never filed such grievances, only that they were "reluctant" to do so, for the reasons explained above. (App. 138a).

was racially discriminatory. Moreover, there was no evidence or finding that the unions treated black and white employees differently in making tactical decisions about how to frame individual grievances. Nor was there any evidence or finding that, in making the tactical decisions that they did, the unions were motivated by a desire that black employees lose their grievances or by a desire that black employees not have the same employment opportunities that whites had. And both the district court and the court of appeals clearly stated a theory of the case that was not premised on any requirement or finding of racial animus: the unions' liability existed " 'regardless of' [their] leadership's favorable disposition towards blacks." (App. 25a, 140a). It is thus clear that when these courts stated, without explanation, that the unions' failure to assert discrimination claims constituted discrimination against black employees, they were expressing a legal conclusion (albeit an erroneous one) and not a factual finding. (App. 26a, 147a).[6]

In an effort to lend some credibility to their assertion that the unions here were guilty of discrimination, rather than just tactical judgments that the courts below disapproved, respondents resort to quoting what was apparently a hypothetical "worst-case" situation that the district court postulated in reasoning to its conclusion that a decision not to argue race discrimination in a grievance is a violation of Title VII and Section 1981.[7] The district court reasoned: "A union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of

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[6] It should be noted that the only place that the district court used the words "discriminated" or "discrimination" in reference to the actions of the unions is in its Conclusions of Law (App. 147a). The district court did not use those terms in the Findings of Fact to describe any action of the unions. (App. 132a-140a).

[7] Even so, respondents merely quote this passage and do not assert or attempt to argue that it constitutes a finding of fact in this case. *See* Brief in Opp. at 7.

success on other issues, or in deference to the perceived desires of its white membership" is liable. (App. 139a-140a). There is no doubt that in deciding whether to raise issues of race discrimination a union *could* be motivated by racial animus, or that if it followed its white members' wishes rather than the wishes of its black members, a union *could* harbor a racial animus or be guilty of disparate treatment. But that is *not this case*. Not only was there no finding that the unions were motivated by racial animus in any respect; the district court did not find that the unions shied away from raising discrimination claims in order to improve their chances of success on *other issues*. The testimony that the district court credited was that the unions made these tactical decisions in order to improve the chances of success in the very grievances in which race might be an issue. Nor was there any suggestion in the evidence, nor any finding by the district court, that in making these tactical decisions the unions were following the wishes of their "white membership" or that the unions' leaders perceived their "white membership" to be hostile to black employees' interests or to the elimination of race discrimination. The regular election of blacks to high union offices and their regular selection as representatives in negotiations as well as in the grievance procedure belie any such suggestion in this case.[8]

4. In an effort that can only be regarded as grasping at straws, respondents argue that the petition conceded the very issue it presented, quoting a passage from page 22 of the petition. Simply reading that passage in context demonstrates that it was not offered as a statement

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[8] *See* Pet. at 5. Although the bargaining unit was approximately 75 percent white, in the 13 years preceding trial—which corresponded to the original limitations period—black employees were selected on three occasions to serve as chairman of the grievance committee and served as chairman for more than 5 years out of the 13. Moreover, black employees were regularly selected to be shop stewards—the front-line grievance representatives—in numbers that exceeded their percentages in the bargaining unit.

of what the law requires unions to do, but as a description of the practical things unions would have to do in order to avoid liability under the decision below.[9]

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for writ of certiorari should be granted.

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[9] The passage is as follows:

> A union cannot control management; it can affect management's conduct in running the business only to the extent that it can secure collective bargaining agreements that limit these managerial powers. A union cannot prevent employer discrimination that violates Title VII unless it negotiates for contract provisions that would prohibit management from engaging in practices that violate that law. And, if it succeeds in obtaining any such contract provisions, it must then expend its resources in the grievance/arbitration procedure to enforce those provisions.
>
> A union duty to take affirmative action to prevent employer discrimination thus dictates the substantive positions that the union must take in bargaining and in contract administration. This is contrary to the national labor policy.

(Pet. at 22).

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JOINT APPENDIX

(Volume I, Pp. 1-320)

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PETITION FOR CERTIORARI IN NO. 85-1626 FILED APRIL 4, 1986
PETITION FOR CERTIORARI IN NO. 85-2010 FILED JUNE 6, 1986
CERTIORARI GRANTED IN BOTH CASES DECEMBER 1, 1986

326 pp

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
District Court	
1973	
June 14	Complaint filed.
Aug. 13	Answer of United Steelworkers of America, AFL-CIO and its Local Unions 1165 and 2295, filed.
Aug. 15	Answer of Lukens Steel Co., filed.
Nov. 29	Plffs' motion for designation as a class action pursuant to Rule 23(b)(2) or, alternatively, Rule 23(b)(3), notice and certification of services, filed.
1974	
Feb. 8	Motion of Dock Meeks, David Dantzler, Jr., and John R. Hicks, III to intervene as plffs., Notice & Certification of Service of Motion, etc., filed.
1975	
June 17	Memorandum, Fullam, J. & Order dd. 6/16/75 that this action may be maintained as a class action pursuant to F.R.C.P. 23(b)(2), on behalf of a class consisting of all black persons who are, or who at any time on or after 6/14/67 have been, or who in the future may be, employed by deft. Lukens Steel Company. The Motion to Intervene as parties plff., filed by Dock Meeks, David Dantzler & John Hicks, III is GRANTED, filed.
June 17	Class Action Complaint in Support. Motion of Dock Meeks, David Dantzler & John Hicks, III filed.
1980	
Feb. 20	NON-JURY TRIAL (2/19/80) (Day #1) . . .
April 2	HEARING RE: Defts. Motions to Dismiss via Rule 41(b), - C.A.V., filed.

DATE	PROCEEDINGS
District Court	
1980	
April 7	TRIAL RESUMES . . .
Oct. 2	Transcripts of trial, First day (2/19/80) thru Thirty-Second day (6/21/80), filed. (36 Vols.)
1984	
Feb. 13	OPINION, FULLAM, J. & ORDER DD. 2/13/84 THAT JUDGMENT IS ENTERED IN FAVOR OF THE PLFF. CLASS & AGAINST ALL DEFTS., ON THE ISSUES OF LIABILITY SPECIFIED IN THE ACCOMPANYING OPINION. JUDGMENT IS ENTERED IN FAVOR OF THE NAMED PLFFS. CHARLES GOODMAN, LYMAN WINFIELD, ROMULUS JONES, RAMON MIDDLETON & DAVID DANTZLER, JR., & AGAINST THE DEFT., LUKENS STEEL COMPANY ONLY, ON LIABILITY, AS TO THE ISSUES SPECIFIED IN THE ACCOMPANYING OPINION. IN ALL OTHER RESPECTS, THE INDIVIDUAL CLAIMS OF THE NAMED PLFFS. ARE DISMISSED, FILED. (JF)
Aug. 6	MEMORANDUM, FULLAM, J. (DD. 8/2/84)/RE ENTRY OF THREE ORDERS: AN INJUNCTIVE ORDER DIRECTED TO DEFT LUKENS STEEL CO., AN INJUNCTIVE DECREE DIRECTED TO THE DEFT UNIONS, & AN ORDER WITH REGARD TO FURTHER PROCEEDINGS IN THE INTERIM; ETC., FILED.
Aug. 6	ORDER DD. 8/2/84 THAT DEFT LUKENS STEEL COMPANY IS ENJOINED FROM DISCRIMINATING AGAINST ITS BLACK EMPLOYEES, ETC., FILED. (JF)

DATE	PROCEEDINGS
District Court	
1984	
Aug. 6	ORDER DD. 8/2/84 THAT DEFT UNITED STEELWORKERS OF AMERICA & DEFTS LOCAL 1165 & LOCAL 2295 OF THE STEELWORKERS (DEFT. UNIONS) ARE ENJOINED FROM DISCRIMINATING AGAINST BLACK EMPLOYEES OF LUKENS STEEL COMPANY, ETC., FILED. (JF)
Aug. 6	ORDER DD. 8/3/84 THAT PLFFS' COUNSEL SHALL SUBMIT A PROPOSED FORM OF CLASS NOTICE FOR REVIEW & APPROVAL BY THIS COURT. THE DEFTS SHALL HAVE 5 DAYS AFTER SUCH SUBMISSION IN WHICH TO REGISTER THEIR OBJECTIONS & COMMENTS. PARTIES MAY APPLY TO ANY JUDGE OR MAGISTRATE OF THIS COURT TO CONDUCT SETTLEMENT DISCUSSIONS & NEGOTIATIONS, ETC. PARTIES DIRECTED TO PROCEED THAT ALL MATTERS NOT THEN DISPOSED OF WILL BE RESOLVED AT A TRIAL, NOW TENTATIVELY SCHEDULED FOR MID-JANUARY 1985, FILED. (JF)
Aug. 15	United Steelworkers of America, AFL-CIO-CLC and its Local Unions 1165 and 2295's Notice of Appeal, filed. (U.S.C.A. No. 84-1478).
Aug. 30	Deft. Lukens Steel Co's notice of appeal, filed. (U.S.C.A. 84-1509).
1985	
Feb. 19	ORDER DD. 2/15/85 REGARDING CLASS NOTICE & PROOF-OF-CLAIM PROCEDURES, FILED. 2/19/85 entered & copies mailed.

DATE	PROCEEDINGS
District Court	
1986	
July 17	JOINT MOTION FOR ORDER REGARDING TENTATIVE APPROVAL OF PROPOSED SETTLEMENT [between Lukens Steel & plaintiffs], RULE 23(e) NOTICE TO CLASS, FILING OF OBJECTIONS AND HEARING ON PROPOSED SETTLEMENT, CERT. OF SERVICE, FILED.
July 17	ORDER DATED 7/17/86. FULLAM, J., THAT UPON CONSIDERATION OF THE JOINT MOTION A HEARING IS HEREBY SCHEDULED FOR 10:00 A.M. ON OCTOBER 6, 1986 IN COURTROOM 15A AT WHICH TIME THE COURT WILL HEAR ARGUMENT AND RECEIVE EVIDENCE IN ORDR TO DETERMINE WHETHER THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND TO CONSIDER WHETHER THE PROPOSED CONSENT DECREE SHOULD BE FINALLY APPROVED, FILED.
Oct. 7	Hearing dated 10/6/86 re: Proposed Settlement . . . .
Court of Appeals	
1984	
Aug. 15	Notice of Appeal filed in No. 84-1478
Aug. 30	Notice of Appeal filed in No. 84-1509
Sept. 18	Jt. Mot. by applts and applees to consolidate appeals at 84-1478 and 84-1509 for all purposes . . .
Oct. 11	Order (*Weis*, Garth, C.J.) granting above motion . . . .
1985	
June 11	ARGUED.

DATE	PROCEEDINGS
Court of Appeals	
1985	
Nov. 13	JUDGMENT - The judgments of D.C. are vacated insofar as the findings that Lukens discriminated in transfers to salary positions and tolerance of racial harassment and cause remanded to D.C. for further consideration in light of this Court's ruling on the appropriate statute of limitations for the § 1981 claims. The D.C.'s finding in favor of the class with respect to initial assignments will be vacated and cause remanded for reconsideration in light of this Court's ruling on class representation. On remand the limitations period pertaining to the Title VII claims against the unions shall be adjusted in acc. w/the opin. of this Court. The finding of discrimination in the denial of incentive pay for the pit crew is reversed and it is directed that on remand the judgment be entered for the defendant on that claim. All of the above in acc. w/the opin. of this Court, filed.
Nov. 22	Order (Weis, Garth & Stapleton, C.Js.) amending opin., filed.
Nov. 27	Petition for rehearing of United Steelworkers, filed.
Nov. 27	Petition for rehearing of Charles Goodman, et al., before the Court in banc, filed.
1986	
Jan. 7	Petition for rehearing of United Steelworkers, DENIED by panel.
Jan. 7	Order (Aldisert, Ch. J., Seitz, Adams, Gibbons, Hunter, *Weis, Garth,* Higginbothan, Sloviter, Becker, Stapleton & Mansmann, C.Js.) denying the petition for rehearing in banc. Judge Gibbons would grant rehearing in banc. Judges Garth and Becker would grant rehearing in banc only with respect to

DATE	PROCEEDINGS
Court of Appeals	
1986	
	the statute of limitations issue, together with separate statement sur denial of petition for rehearing by Judge Garth, filed.
Jan. 7	Motion by Lukens Steel Co. for stay of mandate to and including Feb. 11, 1986, w/serv., filed.
Jan. 9	Order (Weis, C.J.) granting stay of mandate to and including Feb. 11, 1986, filed.
Jan. 27	Motion by Lukens Steel Co. to stay the mandate to and including April 7, 1986, pending disposition of pet. for certiorari, w/serv. filed.
Feb. 3	Order (Weis, C.J.) granting further stay of mandate to and including April 7, 1986, filed.
April —	Notice of Filing of the Petition for Certiorari on April 4, 1986, at S.C. No. 85-1626, filed.
April 14	Notice of Filing of the Petition for Certiorari on April 7, 1986, at S.C. No. 85-1645, filed.
June 13	Notice of Filing of the Petition for Certiorari on June 6, 1986, S.C. No. 85-2010, filed.

PLAINTIFFS' COMPLAINT

[Title Omitted in Printing]

* * * *

49. Defendant labor organizations, contrary to the provisions of Title VII, have failed to fairly represent plaintiffs and the class they represent by:

a. Failing to fairly and adequately process grievances on behalf of black employees.

b. Negotiating and entering into collective bargaining agreements which have the intent and effect of denying blacks equal opportunity for promotion.

c. Failing to represent black persons effectively by passively permitting the employer to discriminate against black persons because of their race and color.

d. Failing to act affirmatively to cause the employer to refrain from discriminating against black employees because of their race and color.

* * * *

51. The practices of defendant labor organizations more fully described above deny plaintiffs and the class they represent their rights under Title VII of the Civil Rights Act of 1964 and the same rights to make and enforce employment contracts as are enjoyed by white citizens of the United States, in violation of the Civil Rights Act of 1866, 42 U.S.C. Section 1981.

* * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS IN DISTRICT COURT

[Page references in official transcript appear in brackets with each excerpt.]

* * * *

[1-25] REV. DR. JOSHUA GROVE, II, sworn.

DIRECT EXAMINATION

BY MR. EWING:

Q Dr. Grove, would you state your present employment, please?

A Pastor of the Pleasant Grove Baptist Church, Philadelphia, 3909 Lancaster Avenue, Philadelphia.

Q When did you work at Lukens Steel company?

A I begun July, 1951 and concluded in 1971, January.

* * * *

[1-33] Q Did there come a time when you made a complaint to either the company officials or to the unions about locker rooms?

A Yes.

Q Could you tell us when that occurred?

A That was—it must have started in '59 but it really got on paper in '62.

Q What was the nature of your complaint?

A My complaint was that the practices of assigning blacks to one shower room and the whites to another and especially the difference in the condition was unfair and it was illegal.

[1-34] Q What was the difference in condition?

A Number one, it was crowded in there like sardines in a can and there was times that the waterbugs or whatever you call them was so large you was afraid to go in there with your shoes on.

Q Is that the black locker room you are speaking of?
A Yes.
Q And what was—had you ever seen the white locker room?
A Yes.
Q What was that like?
A Much better, much better. I wanted to find out to make sure either they both was the same or there was a difference. So I went in there and when I walked in there strangely enough the janitor threatened to throw me out. I just walked in to look around and I did that several times and there was a vast difference between the two.
Q Would you tell us what company officials you complained to and what was—what conversation you had with each of them?
A I started off with the fellows in the shop with me trying to get their feeling because I knew if I eventually get this done I would have to move in with them to see what the attitude was and—I found no indication among any of them that they were favorable towards either helping me to get this change or didn't care too much about me coming in there. I [1-35] went to the foreman. I discussed it with him and he told me—I think he said that was not his responsibility to assign.

But anyway, I went to Mr. Richard Swagger, that is his name, he was in charge. I went to his office. I sat down and I talked it over with him. Mr. Swagger informed me that he worked for Lukens Steel Company and whatever their policy was it was his job to carry it out.

I went to Mr. William Whiteman, who was his supervisor and I had a time getting an invitation to see him but I finally saw him. We sat down and I explained to him what my complaint was. His first reaction was that we have had—we have had health men to inspect all of these facilities and they gave us their okay that they was

all right. But however, he did agree to make an observation to see if something had happened between the time they made the last inspection and I was in his office.

So I said, okay. And at the time I was supposed to go back, I went back and I never got past Ms. Frances Hall. I never got past her.

Q Who is she?

A I am not sure whether she was his receptionist or secretary. Whatever she was I never got past her on the issue. After that I went to see Mr. Harry Martin and relaid the issue on his desk. He said, number one, he did not think it was as bad as I said it was. First he told me Mr. Whiteman had [1-36] indicated I had been to his office on this issue. And then he said, "I don't think they are that bad and first of all, we do not assign them on a segregated basis. We assign them in the department according to where they work." And I was shocked. I said, "Now, these other white fellows work in the same department that I work. I did not select to go in that hole." One of the security guards carried me there and assigned me, the person that was there, gave me a key and a locker. Yet he told me "we don't assign them that way." And I raised the question. If this is so then either all of the guys that work in my shop should be in my shower room or all of them should be in one of the other ones. But the company was responsible for assigning them. So he agreed also to make an observation and he says, "Okay, you come back and see me in a few days." I said, "Well, let's make a schedule. Tell me what day and what time to come back and I will come back."

So I did. I went back and faithfully he said, "I want to tell you that some of the places are as bad as you say they are and here is what we are going to do. We are going to begin to move, close up some of them, we are going to move some of them around." I waited a short

span of time and I didn't see any movement, I didn't see any movement. But while we was in there discussing this, it might have been the second time I went back to see him, and I said, "Now, Mr. Martin, this is a discriminatory practice. It is wrong. It [1-37] is illegal and you don't realize what you are doing to us as a group of people." He said, "Mr. Grove, I want to tell you something. You make me feel very bad. I have just filed a report with the Defense Department, Government contracts, I am very proud of this report." I remember telling Mr. Martin, "You falsified that report." He said, "You are making an accusation." I said, "No, I am not making an accusation, I am making a charge. You falsified that report. I am prepared to prove it. You want to write it down, notarize and I will sign it. I am prepared to prove it. If you want to carry it out on this basis or we will file charges to have it done." I think we set a date. Anyway, when I left his office I went home, I typed the charges up and I waited until a specific day and I had talked to—in the meantime, I talked to a Mr. Joseph Foy, who was working across—he was the union president I believe, 1962, across the street from where I was working. I talked to him. He said he will talk to him about it. The first time I told him he said Mr. Whiteman said get me off of his back and I explained to him, to make a long story short, "Mr. Foy, I have the charges all typed up. I have the letter already addressed. I have a stamp on it and if you do not get some kind of commitment from them by 5:00 o'clock today I will file these charges by dropping it in the mail" and that is what I done. I dropped it in the mail and filed the charges.

[1-38] Q Who is Mr. Foy?

A President of the local union, Joseph Foy, I believe his first name was.

Q And who is Mr. Morton?

A Mr. Martin, I think he was the personel manager, Harry Martin was his name.

* * * *

[1-41] Q To your knowledge, did the company take any action on your complaint before you filed the charges?

A Before, no.

Q Did you complain to anybody else besides Mr. Foy who was the union official?

THE COURT: Anybody else who was a union official he wants to know.

THE WITNESS: I am trying to think.

(Pause.)

THE WITNESS: Well, I know definitely, definitely Mr. Foy and I discussed it several, several times.

BY MR. EWING:

Q Do you know whether Mr. Foy took any action?

A No, not to my knowledge but as I say, he told me he [1-42] would talk with him and he said he did. Now, I did not see him talk with him. Even on the last day he said, "Hold off, hold off and let me talk to them again before we get into filing charges. Maybe, maybe they would go this route by knowing that something needs to be done, there are some complaints."

One of the other things when I pressured him, I remember now, I pressured him about let's start some place and resolve this and he raised this question: "If I had any idea what the repercussion would be after being separated so long, if you bring these fellows together, what would the repercussion be?" That was the question he raised. I said to him, "I don't think there will be any repercussion because normally we do what we have to do."

Q Did you ask him to explain what he meant by the repercussions?

A I wanted to be sure about what he meant about repercussion. I had an idea. I said, "What do you mean by repercussion?" He said, "The anger, the anger this will stir up between the blacks and whites."

Now, he was aware of the complaint being made because things gets around fast. He said, "I am aware, I am aware this has been passed around that you are doing this" and he raised a question that I had an idea what repercussion would occur.

[1-43] Q Did he give any suggestion that he had any idea what repercussions would occur?

A Well, the only thing he said specifically was "Be cause you bring a group like this together, if they are angry and they have been separated all these years, you bring them together it could be like some kind of explosion." I took what he said, he thought there would be fighting and carrying on, or maybe a race riot, this kind of thing, which I didn't think would happen and it didn't happen.

Q Did he make any statement as to whether he would do anything about it?

A No, no, because that was understood that the company had control of this assignment. He did tell me on two occasions and the last day that "I will go back and talk to them again."

* * * *

[1-53] Q Did you discuss these complaints that you mentioned regarding job assignment and so on with union officials?

A I discussed that with every union official, every union member I could get to listen to me.

Q And what complaint did you take to them?

A The whole bag.

Q I don't know whether the bag is clear or not.

A When I say the whole bag, I mean beginning with the [1-54] hiring, the upgrading and the whole works. I would explain them too, explain this to them.

Q With whom?

A The officials.

Q The hiring and upgrading of whom?

A Of blacks.

Q Who did you talk to that was a union official?

A Well, every one of the presidents from Mike Reach to Lloyd Lawrence.

Q Who else was in there?

A In there?

Q Who was in between?

A Well, there was Mike Reach, Albert Cooper, Joe Foy, Frank Pilotti, Lloyd Lawrence and Harry "Koloof".

* * * *

[1-55] Q Dr. Grove, you mentioned that you had complained to presidents of the union that you named regarding certain practices. Did you complain about them to any other union officials?

A Yes.

Q Who were they?

A One fellow in particular, Mr., I think his name was Malcolm Detterline.

THE COURT: Can you spell that name for the record?

MR. EWING: D-e-t-t-e-r-l-i-n-e.

THE COURT: Thank you.

BY MR. EWING:

Q Any others?

A Malcolm Detterline and it was Ben Pilotti, we discussed this frequently and it was—one of them has since passed. There was another one.

[1-55a] Q Who was that?

A I am trying to think.

THE COURT: Who is the one who is no longer with us?

THE WITNESS: Charlie Wischuk.

BY MR. EWING:

Q What was the response that you received from these union officials?

A Ben Pilotti, it took me quite a while, I am not sure whether I ever fully convinced him, that there was such a thing as discrimination. As he stated to me, he had been in Coatesville X number of years. This is the way the practice was. They more or less accepted it as being a standard thing. As far as there being discrimination, why it was doing to the black people that I tried to explain to him it was doing and how it had the strangle hold on them. Each time he would come into our shop, he was a Pipefitter, some kind of mechanic, he was working on the machine. And we discussed this quite frequently. But he never give me any indication that he would really put forth any effort to try to help me bring about any change.

But Mr. Detterline, I am sorry that he is not here alive to hear me say this. He said something to me that was very important. He said there are some things you have to do for yourself and if you really expect to get this [1-56] job done you are going to have to do it, take your chances. If you win, okay. If you get canned, okay. But you got canned for something that you believed in.

Q The various union presidents that you talked with, what action did they say they would take, if any?

A I don't think I ever got—no, I didn't. I never got a commitment from no president of the union or anybody else that I raised the question about discrimination

to, that they would take any specific action. I can't even remember a person positively agreeing with me that we had the kind of in-depth problem existing among us at the present time—I am not talking something about 20 or 40 years ago, I am talking about up until the time that I left Lukens Steel Company, even until this day.

Q Did you discuss these problems with any black officials of the unions?

A I did.

Q Who did you talk with?

A I discussed it with Mr. Greenlee over a period of years, both inside the mill and outside of the mill. I used to go by his shop and discuss it with him.

Q Is that Vernon Greenlee?

A Vernon Greenlee. I discussed it with him. Quite frequently I discussed it with him.

Q Anybody else?

[1-57] A Mr. Whitaker. Mr. Whitaker, we discussed it, Mr. James Brown, long before he was president.

Q And what response did you receive from those three gentlemen?

A Mr. Greenlee at the first outset, he began telling me about some of the token advancements that had been made by the Negro, including himself, some of the token advancements. And he told me about putting on pressure in these areas and he said that he had applied pressure where it related to a fellow getting into the Crane Department and shortly after that he went out of office. He did tell me how long it was after. That was Mr. Greenlee.

But Isaac Whitaker, we didn't do too much discussion because his attitude towards it, he was very allusive and he was not going to get involved in anything that would mar his chances of moving up, or mar his chances of operating in the position where he was.

MR. LANDIS: Objection.

MS. CLARK: Objection, Your Honor, that is the witness' opinion only.

THE COURT: Yes, it is. Objection sustained.

BY MR. EWING:

Q What did Mr. Greenlee say specifically, if you can recall—Mr. Whitaker, I am sorry?

[1-58] A As I said, this is what he said. Mr. Whitaker said that he was not going to get involved in that type of thing. Specifically when I spoke to him about discrimination in the different departments and I asked him, I said, "You are in position now, aren't you going to try to do something, maybe loosen things up so guys can move up?" He told me he wasn't going to get involved in anything like that would create a problem for him.

Q How about Mr. Brown?

A Well, Mr. Brown, when he came to power that was after—he was in power as vice president—the last time I talked to him just before he passed. We were in a council meeting. We didn't have too much time to talk. But I talked to him about three times in a short span at a conference and that is the last time I mentioned to him about that. He said, "Well, you know, I got my hands full. I am doing a lot of things in the union proper and also in the council and I really got my hands full." I said, "What are you doing specifically on the item that we discussed across the years," wherever we met? We had no specific place to discuss discrimination and segregation at Lukens Steel Company as related to the Negroes. I still did not get the clear commitment from him as to what he intended to do or what he was doing.

* * * *

[1-77] CROSS-EXAMINATION

BY MR. LANDIS:

Q So the last time you worked in Lukens was December 6, 1969?

A December 26th.

Q December 26th. That is all. Thanks.

* * * *

[1-80] Q The gripe that you expressed to union leaders about that incident when you were asking them to do something was that any kind of seniority was used. Isn't that correct?

A I don't think I understand you.

THE COURT: What did you complain to the union about concerning that item?

THE WITNESS: As far as seniority is concerned?

THE COURT: Right.

THE WITNESS: Oh, my complaint was that the way it was set up the deck was stacked and we need to find some way of switching it around.

BY MS. CLARK:

Q Some way other than seniority?

A Well, it could be a combination, not necessarily. I didn't give any definite plans how you do it but just do it some way, let's come up with some other way.

Q Something other than straight seniority?

A Other than straight seniority.

Q The complaints that you made to union officers which [1-81] you described that you made over and over and over again during your time at the company, you in fact were making a very specific demand to all of those people, weren't you?

A No, I wasn't in a position to make demands.

Q You were asking them specifically to negotiate for a program, weren't you, in which jobs would be posted for all employees to know what jobs were open and so that blacks could get openings, so exceptions could be

made in seniority so blacks could move up in openings involving senior whites; is that correct?

A I think you are asking me three questions, ask me one at a time.

THE COURT: So do I.

THE WITNESS: Ask one at a time.

THE COURT: Which of those things did you ask them to do?

THE WITNESS: Which one?

BY MS. CLARK:

Q You did ask them about posting; isn't that correct?

A Yes, sir, that is right.

Q You asked them to negotiate a system in which seniority would not be followed in filling vacancies but something different would be used so that blacks could move up ahead of senior whites; isn't that correct?

A I stated before I did not give a clear request on what [1-82] kind of a seniority. That could be worked out but there had to be some kind of a system to make it fair.

Q Mr. Grove, you recall being deposed in this case, don't you? Do you recall my taking your deposition testimony?

A Yes.

Q And do you recall being asked, and I am referring to deposition transcript Page 43, "Did you consider or was it your idea that blacks should be given some kind of preference in promotions or simply that the company would be agreeing that it would promote in a non-discriminatory fashion?" And your answer: "There is two parts to that. I will have to give you the answer to that in two parts. Number one, by virtue of the fact that there was such a bulk of them who had been denied the opportunity, you are going to have to work out some system to give them a fair share of employment."

"Q Some system other than seniority, I take it?
"A That's right."

Do you recall being asked those questions and giving those answers at your deposition?

A Maybe you misinterpreted the meaning from my answer.

Q Do you recall being asked those questions and giving those answers?

A I did.

Q Thank you, Mr. Grove.

Are you aware in fact that the union had [1-83] proposed and did propose a system of job posting at Lukens Steel?

A I am now aware.

Q And are you aware that the company and the union agreed to put a non-discrimination clause in the contract?

A I heard something about that.

Q And as a Shop Steward with the responsibility for enforcing the union contract, you, of course, knew it was a basic principle of the union that seniority should be used to fill job vacancies, didn't you?

A Will you restate that question?

THE COURT: Try to shorten the question.

THE WITNESS: Yes, shorten it.

BY MS. CLARK:

Q You knew, didn't you, that it was a basic principle of the union that seniority should be used to fill job vacancies?

A I did answer that question, in that deposition you asked me a question similar to that and I told you as far as the things on the books, even the ones we have, there was no problem with them but implementation is the problem.

Q Mr. Grove, I think you haven't answered my question.

A Maybe you didn't get the answer that I asked.

Q The question I asked you, were you not aware it is an expressed principle of the union that job vacancies should be filled on the basis of seniority?

[1-84] A I answered that question before. I told you.

THE COURT: Would you answer it now and do it quickly? Were you aware that the union stuck up for seniority?

THE WITNESS: Oh, yes.

* * * *

[1-85] Q Your account of your conversations with Mr. Foy, he in fact told you that he has spoken to the company to see if he had agreed what they were proposing; isn't that right?

A Yes.

Q And he came back and reporting to you that the company would not agree at that time; isn't that correct?

A Right.

Q And he told you his position was it would take some time to make these changes; isn't that also right?

A Yes.

Q And Mr. Foy, of course, is dead so he can't come in here and testify about his version of the conversation, can he?

A That is right.

* * * *

[1-101] SAMUEL BAXTER, sworn.

DIRECT EXAMINATION

BY MS. GARTRELL:

Q Mr. Baxter, are you presently employed?

A No, I am retired.

Q When did you retire?

A In '78, in 1978.

Q 1978?

A Around March.

Q For what period of time were you employed by Lukens Steel Company?

A Oh, first, 1951 and I quit and I came back in 1953 until 1978.

* * * *

[1-111] Q When did you finally get in the Miscellaneous Weld Shop, Mr. Baxter?

A I think it was '63, if I am not mistaken. It was in 1967.

* * * *

[1-119] Q After you got into Miscellaneous Weld, did you experience any scheduling problems which you considered to be related to your race?

A Well, the Foreman had a right to schedule and he had to schedule—the other department called in for a Welder like the Pipefitters, they would call in for a Welder. If the Foreman had to schedule the next day where he should send this Welder and that Welder.

Now, the mills are awfully greasy. Working with electric furnaces is awfully dirty. Well, you would end up being in the mills or Electric Furnace. Some Welders which she shouldn't have been because I don't remember these jobs posted, one Welder went to that job at all times. His bonus system was higher on that job because I think the only department in Mechanical Maintenance that work those plates, material. By sending them on customer work, bonus was always higher. So we were all in the same job class but our Job Class 16, and I am Job Class 16 and the other fellow, he could still make more money by the Foreman sending him on a higher bonus job where at the West Side electric bonus is higher this quarter they would send a white. I probably end up rigging for Pipefitters or anything like that. It was two of us mostly went [1-120] to the Pipe Shop, George Bussey and myself. He might weld on the pipe and when they send him out in the field and George make 10 and I make 2. And the——

Q Did you or any black Welders complain about the scheduling of jobs within the unit, the scheduling that you just described?

A Yes, I talked at this time, I think, Ben Pilotti. And he told me what did your Foreman ask you to do. I says, well, he said what is your job description. I says, well, he is not doing anything out of your job description, the way he sending me on the job, the best man for the best job.

Q Did you complain to Mr. Pilotti you were being discriminated against your race and not being asked to do something besides weld?

A He said prove it.

Q Did any other black employee in the Miscellaneous Weld Subdivision complain about this kind of scheduling?

A Yes, they did but it was just like they said when the union or the company had got together and gave the Foreman the privilege to schedule you on these jobs, the Foreman has a right to schedule, it was nothing you could do. The Foreman could use the same law to punish you and still within the law of the company.

* * * *

[1-128] Q Now, did you ever complain to union representatives or officials about race discrimination at Lukens?

A Yes, I complained a lot of times but I never complained directly by official papers, just by talking at different times.

Q Who did you talk to?

A I know I talk to Witte when I first went to Lukenweld. The blacks were always sent—given jobs doing carbon steel, dirty steel, they had stainless steel mixed in at this time. But all whites worked on the stainless steel and nearly all blacks in the cleaning. And the first black that ever—that started welding stainless steel was Henry Jackson, although all of us was in the same job classification.

Q Who was Mr. Witte?

A He had something to do with the union. In fact, I didn't know about the union anyhow.

Q Was Lukenweld a separate union from Lukens?

A Yes, it was separate.

Q That was still true as of the time you left; is that right?

A Yes.

Q When you worked at Lukenweld, were you a member of the Lukenweld union?

A Yes, I was.

[1-129] Q Was Charlie Witte an official of that union?

A Yes, he was.

Q What did Mr. Witte respond to you when you complained to him?

A I think he said something about that is the way they are supposed to be. I am not sure. Anyhow, it was something smart. If you want to know the truth about the company and the union, catch them by themselves and talk to them. Whatever is in their mind, that is what they will come out their mouth. They will never say that in front of a witness.

Q Did Mr. Witte say that to you in private?

A Yes.

Q Did you understand him to mean by that blacks deserved——

MS. CLARK: Objection, that is a leading question.

THE COURT: Objection overruled, it certainly is and it certainly speeds things up.

THE WITNESS: Yes.

BY MS. GARTREL:

Q Mr. Baxter, did you complain to any officials of the Lukens' union?

A Oh, yes, I complained.

Q Because you were a member of that union as well?

A Yes.

[1-130] Q Who did you complain to?

A I called to Cavuto, Ben Pilotti and him and I used to have—practically every other weekend I ended working with Benny, every other Sunday working in the office. We was talking over union things, how hard we had it years ago and when we lived out on the avenue together, we had it hard. He is president of the union and I am still here in this grease. He told me, he said, "Sam, Ben comes first." That is what he told me. Benny comes first.

Q Do you remember what Mr. Cavuto said to you when you complained to him about discrimination against black employees?

A It came out this way. He asked me, "What is your job description?" And I told him what my job description is. "That is what you are supposed to do, what your job description calls for." Wherever the Foreman sends us, wherever they put us on that is where we are supposed to go.

* * * *

[2-14] Q Now, with reference to the problem you discussed about scheduling Welders on jobs that pay higher incentives versus jobs you were scheduled on, Mr. Hess' scheduling, when you spoke to Mr. Pilotti about that, in fact, what he told you was the union couldn't do anything about that.

A He said the Foreman have the right to schedule.

Q And didn't he tell you that the union had tried to change that practice and had not been able to?

A No, he never did tell me that.

Q And he didn't tell you that the union had in fact gone to arbitration on that issue and had lost the case?

A No, he didn't tell me that.

Q And when you mentioned to him that you thought it was race discrimination, in fact, what he told you was that if you wanted to file a grievance on discrimination you have to be in a position to prove it?

A He told me discrimination was hard to prove and I asked [2-15] him was that the reason——

Q I am sorry, I didn't understand the last part of your answer.

A What I am trying to say is this: The union would always back up the company with what you call "our hands are tied with the grievance." If anything is wrong, do it whether it is safe or not, do it and follow the grievance. And those issues would be settled right there.

Q You follow instructions from your Foreman, if you think there is a problem then you are supposed to grieve about it later on?

A If the Foreman give you a job which is in your job class, you know he is railroading you and you know you can't prove it, they tell you go home, take the day off and file a grievance and come to union and fight. Two or three years fighting the same case over and over again.

Q On this scheduling problem Mr. Pilotti told you discrimination was a hard thing to prove?

A Yes, he did.

Q You told him blacks had been scheduled on this [higher] incentive job that you wanted, Mr. Hess did schedule blacks on that job?

A It was like this. When a fellow go on vacation somebody had to fill in for them. A lot of those jobs was like, what we will call cales job, in other words, we are welding for an [2-16] outside company. If a fellow goes on vacation a lot of those other fellows couldn't do some of those jobs. They have to send the best man they can to replace those fellows.

Q When that would happen they would send blacks over?

A Not necessarily blacks. That would be the only chance he would get to weld on some of those jobs, somebody off on vacation. I could do it on vacation but when they was in the place I couldn't do it.

One day I was "A" Class Welder and tomorrow I wasn't anything.

Q Now, with reference to the other black men in the Miscellaneous Weld Shop, you testified a moment ago

that Mr. Hess did in fact schedule them on the higher incentive work.

A The blacks?

Q Yes. You said that a moment ago, didn't you?

A In fact, what I was saying, you would hit it every now and then but it wasn't consistent.

* * * *

[2-18] REV. GEORGE MYERS, affirmed.

DIRECT EXAMINATION

BY MS. GARTRELL:

Q Rev. Myers, where are you presently employed? Are you presently employed?

A No, ma'am. I am on pension from Lukens Steel Company.

Q When were you last employed?

[2-19] A Last of March, 1972 I was pensioned off from Lukens.

Q How many years had you worked at Lukens at that time?

A 45.

Q What job did you hold at Lukens for most of that time?

A Supervisor, Night Supervisor or General Foreman, Night Foreman.

* * * *

Q When did you first become a Foreman at Lukens?

A In the early '40's.

* * * *

[2-28] Q When you first went to Lukens, were there jobs that were held only by whites and jobs that were held only by blacks?

A Yes, ma'am, most all of them.

Q Could you tell us those jobs which were held only by blacks?

[2-29] A Shearing Department where they cut plates; Labor Department and its construction; the Mill where they clean debris, that would be Labor, too; Road Crews for oiling the roads, keep the dust down, we didn't have hardtop roads then; Stocking Gangs, where you shovel lime, jobs like that.

Q Did you know anything about the Open Hearth Pit and Floor area?

A Yes, ma'am, the Open Hearth Pit had a few colored in it, a few.

MR. SILBERMAN: I am sorry, I didn't hear that, Your Honor.

THE COURT: A few colored in it.

MR. SILBERMAN: Thank you.

BY MS. GARTRELL:

Q Did you say the pits or the floor?

A A few colored.

Q The pits or floor?

A The pits had a few colored in it. The floor didn't have any. The pits had a few colored in it. It was Italian or foreign and colored in it but there were more foreigners in there than they were colored.

Q Did you work in the area near where the Track Gang worked?

A I worked all around there, in all areas where they worked.

[2-30] Q Did you have some familiarity with the Conductors and the Engineers?

A Yes, ma'am.

* * * *

[2-42] Q Rev. Myers, at any time before you left Lukens Steel Company in 1972, did you ever see any evidence that the company was attempting to bring about equal job opportunity for black employees?

A I didn't, not visibly, I didn't.

Q Did you ever see any evidence that the union was attempting to bring about equal job opportunity for blacks at Lukens?

A No, no.

* * * *

[2-43] CROSS-EXAMINATION

BY MR. SILBERMAN:

Q Rev. Myers, when you came to Lukens there was no seniority system; is that correct?

A As such.

* * * *

[2-46] Q You do know when you were at Lukens there was a seniority system; is that correct?

A As such.

Q And that seniority system was governed by rules that were in the collective bargaining agreement; is that correct?

A That was what?

Q Was set up by rules in a collective bargaining agreement; is that correct?

A This I disagree with.

Q You do know that the union and the company sat down and negotiated seniority rules together; is that correct?

[2-47] A This I don't know.

THE COURT: How would he know that? He wasn't there.

THE WITNESS: I don't know that. You are asking me something I don't know.

THE COURT: Is it your general impression that the union did negotiate an agreement which covered seniority?

THE WITNESS: Contract-wise you are talking about?

THE COURT: That is right.

THE WITNESS: Yes, Your Honor.

THE COURT: Okay, that is all he is trying to get you to agree to.

THE WITNESS: Okay.

BY MR. SILBERMAN:

Q Am I correct to say that occurred in the early 1940's as far as you are aware?

A I am not aware when it took place because I wasn't interested in it.

* * * *

[2-53] BY MR. SILBERMAN:

Q When the union was first organized at Lukens Steel Company, blacks and whites joined the union together; is that correct?

[2-54] A Sir, I don't know anything about Lukens Company and the union and what they done. I was not a union man. I was a company salaried man. I was not interested in what the union done and what the Lukens done. Clean off the record, I don't know anything about them.

* * * *

[2-57] ROBERT LEWIS, sworn.

DIRECT EXAMINATION

* * * *

What is your age, Mr. Lewis?

A 70.

Q How many years did you work for Lukens Steel Company?

A 46 years—46 years and 7 weeks.

Q When did you retire?

A 1972. I haven't worked since '72 because vacation come [2-58] in between there.

Q And you officially retired in '73?

A Yes.

Q What was your job when you retired?

A Locomotive Engineer.

Q And prior to that what was your job at Lukens?

A Conductor.

Q Were you one of the first black Engineers at Lukens?

A Yes. I was the third on a Narrow [Gauge], the third Engineer on the Narrow [Gauge] and the first on the [Broad Gauge].

Q When you became a Conductor at Lukens, were there any black Engineers at that time?

A No.

Q Did you make some effort to change that so that blacks could become Engineers?

A I asked for a job back in '28 and the man that was running the Locomotive Department told me that there was no jobs for me under his supervision. I will make it plaint to you. The Conductors were working under Copeland and the Engineers was working under M. D. Parker. Naturally I asked him for a chance at the job, Parker, and he told me that he didn't have any job for me.

Q Did he tell you why?

A No. He didn't go no further because he knew that I really wanted the job, I would take it.

[2-59] And in '44 I went on the Narrow [Gauge] Engine and I was the third black man to go on the Narrow [Gauge] Engine.

Q What did you have to do to get that job?

A What did I have to do, well, I was conducting already and I had put a great many years in there and I understood everything. I went through the procedure that the company asked for and I made out and I worked there until '58 and then I went on the [broad] gauge.

* * * *

[2-67] Q Now, inside the plant at Lukens, what were race relations like over the time that you were employed there?

A Well, inside the plant and out of sight the workmens got along together, they got along good. But if you are not [2-68] sure of yourself, you can't trust them.

Q Were you aware at any time of any efforts made by the union to improve the race relations in the plant in any respect, to integrate facilities or to integrate jobs or job groups?

A No.

* * * *

[2-71] CROSS-EXAMINATION

* * * *

Q Mr. Lewis, are you aware that in the 1940's the union negotiated an agreement that would provide for the Engineers' job to be filled by Conductors?

MR. EWING: Objection.

THE WITNESS: 1940?

MR. EWING: Objection, Your Honor.

THE COURT: Objection overruled.

(Pause.)

THE WITNESS: In the 1940's?

BY MS. CLARK:

Q Yes. Are you aware of such an agreement?

A What is your question?

Q Are you aware of an agreement that the union [2-72] negotiated that Engineers' jobs vacancies would be filled from the men in the Conductor Division?

A No. We had a man from Pittsburg to come down to straighten that out and about 20 days after that a black man went on the engine at Lukens.

Q Was that the first black man to go on the engine?

A Yes, Jesse Gaines.

Q That man from Pittsburg, was he from the International Union?

A Yes, he was down there. And he made it possible for what you are talking about.

Q Are you also aware of the union negotiating transfer rights for all employees at Lukens?

A Pardon me?

Q Are you aware that the union negotiated an agreement that employees could use their seniority to transfer from the subdivision where they were to some other place in the plant?

A Yes.

* * * *

[2-164] MILTON BAXTER, sworn.

DIRECT EXAMINATION

* * * *

[2-179] Q Let's look at another request for transfer dated June 17, 1968. It states that the job requested was Carpenter.

Let me ask you, Mr. Baxter, why were you filing all of these requests for transfer?

A I was trying to better myself. What I really wanted was to get in the trades and crafts. But I tried a couple of salaried jobs, I didn't get those, what I really wanted was to get into the trades and crafts.

Q Let's go back to P-419, when you requested transfer to the Carpenter's unit. There is a letter attached to Exhibit P-419 to you dated July 9, 1968.

Do you recall what the response was to the request for transfer to the Carpenter's Shop?

A I got a letter in the mail. Now, it wasn't this letter here but I got a letter in the mail saying I wasn't qualified.

Q Anybody ever tell you what the qualifications were?

A No.

Q What was the racial composition of the seniority unit in which the Carpenter's job was located back in 1968?

[2-180] A It was an all white shop.

Q Did you complain to any union official about this request for transfer being denied?

A I talked to "Yi" Brown.

Q Who is "Yi" Brown?

A At this time "Yi"Brown was my Shop Steward, my Committeeman.

Q Is Mr. Brown deceased today?

A Yes, he is deceased.

Q Is Mr. Brown black?

A Yes.

Q What happened after you complained to Mr. Brown?

A Jim told me that he would check into it.

Q What happened after that?

A Several days later he told me, he said, "Milt, there is nothing that can be done about it."

Q Did he tell you why?

A He said, "They are not hiring blacks in that department."

* * * *

[3-25] JAMES W. MOBLEY, sworn.

DIRECT EXAMINATION

BY MR. BORISH:

Q Rev. Mobley, I have handed you several exhibits which I will ask you to refer to during the course of your testimony. By whom are you presently employed?

A Lukens Steel Company.

Q When did you first go to work for Lukens?

A October 16, 1950.

* * * *

[3-29] A Yes. I have a bad history of high blood pressure. Since I had just come out of the hospital and had been cleared for the first day to come back to work and when I had gotten cleared to come back to work, I was scheduled as a Grinder.

Q What job had you held before you went out sick?

A I was a Stretcher Operator. May I explain it?

Q Yes.

A I was a Stretcher Operator before I—the operation of the Stretcher operates two turns, 8:00 to 4:00 and 12:00 to 8:00. By me being the younger men, if the Stretcher goes down to one turn I automatically should come back to Material Handler. When I came back from the hospital the Stretcher was on one turn.

Q So what job should you have been——

A I should have been a Material Handler.

Q And you said you were scheduled to grind?

A That is right. The schedule said to be a Grinder.

Q What did you do about that?

A I went—I tried to see about it to get it changed.

Q Who did you see?

A I went to see the supervisor.

Q Can you explain the circumstances and what happened?

A Yes, sir, I did.

Q Can you explain now what happened?

A Can I explain what happened?

[3-30] Q Yes.

A Yes, sir. I walked up and looked at the schedule and alongside of me there was another white man which was a Shop Steward.

Q What was his name?

A Don Smith.

Q Continue, please.

A He also was scheduled to grind. He was very upset about him being scheduled to grind and he said openly he wasn't going to grind. He said, "I will change this." He left the floor and left me standing by the schedule, went into the office, and got his scheduled changed.

Q Was he more senior than you in the Cladding unit?

A No, sir. I had 25 years more time than he did.

Q What did you do?

A When he came back out he said, "I told you I wasn't going to grind." Well, I figured, I was 25 years his senior, maybe it was a chance for me to get mine changed. I went to see the same supervisor, Robert Roussey, he told me he wouldn't change it, couldn't change it, I had to grind for at least a week, which I did.

Q What did you do then?

A I came back out of the shop and walked over to Don Smith. I said, "Well, Don, you are the union representative. Is there anything you can do for me?" He just looked at me [3-31] and walked away.

Q What job class is a Grinder, was a Grider at this time?

A I am almost certain it is 5.

Q What job class was the job you felt you should have had?

A 8.

Q Did you complain to any other union personnel about this problem?

A Yes, I talked to another union Shop Steward by the name of Roy Bracken.

Q What was the response?

A None. The only thing he said, he said, "Jim, this isn't right," and that is all he said.

Q Now, when did this incident occur?

A This happened late '70's.

Q Have you known any white employees who have come back off of sick leave and gone back on to the job that they had left?

A Yes, I do.

Q Who are they?

A One was Harry Franciscus. He left a Layer Out, he came back a Layer Out.

Q Any others that you know of?

A One named Harry Barish, another Layer Out. He went [3-32] out a Layer Out and came back a Layer Out.

Q Any others that you know?

A Yes. Harvey Feaster is a Layer Out.

* * * *

[3-46] Q Go ahead and explain it.

A Now, when you say problems, when a Turn Foreman works with a group of men, he does not treat—he does not approach all men alike. All men aren't the same. To me—to Johnny I was a man that would not retaliate by cursing him and flaring back up at him. So therefore, how he treated me was differently from another man that would curse him back when he went into his tempers and throwing his hat around and tramping down, naturally he would approach him.

When you say problems, I mean the way that he [3-47] and I got along. There were other things that John Rissell did racially to other men that was different from the way he treated me because I was a different man. If John Rissell thought that another man would curse him out and be to him just what he was to another man, he approached and worked with that man differently. But the racial motivation was there.

Q Did you complain to any supervisor about this? Did you take it to his boss about this that you say was wrong with him?

(Pause.)

A No more than the union.

Q You complained—did you complain to Labor Relations about the way Mr. Rissell was treating you, the racial motivation that you said he had?

A No, sir, I didn't. I did not.

Q You didn't take it to Labor Relations? You didn't take it to his boss either; is that right?

A No, sir. The union knew it.

* * * *

[3-54] MONROE W. JONES, sworn.

* * * *

[3-60] Q And what was the standard practice or the rules for Helpers in order to advance to the next job category?

A You went in as a Helper. You worked 1,040 hours. Then you took a written test and some field work to pass the third class

Q And did you have to work 1,040 hours before you took the written test?

A Yes, I did.

Q Now, when you took a third class test, did you pass it?

A Yes, I did.

Q What was the next step up and how did you get there?

A Then you worked 1,040 more hours. You take another test and I took it and I failed it.

Q What did you do after that?

A I worked 1,040 more hours.

Q Then you were allowed to retake the test?

A Retake the test.

Q And what happened that time?

A Well, they had two other Painters up for a second class test.

Q What happened to you at that time?

A When I took it, I passed it.

Q And did you subsequently take the test for First Class Painter?

[3-61] A After 1,040 more hours.

Q And did you pass that?

A Yes.

Q Did you ever receive any help with regard to any of those tests, what to expect on them and how to prepare for them?

A No, I didn't.

Q Are you aware of any other employees having received help on tests?

A Yes, I do.

Q Could you tell me about that?

A Well, there was two other fellows up for second class test the same time I was. And the Foreman, the day we were supposed to take the test the Foreman had them up in the shop tutoring them on the test.

Q What were their names?

A James Anderson and I think the other fellow's name was James McPeak.

Q Did you make any complaint about that?

A Yes, I went to Ben Pilotti. I told him I wanted to file a grievance. And he said, "What kind?" I said, "Discriminating." I told him what happened. He said he will take care of it. So a week went by and I went back to him and I asked him if he filed it and he said, "You know I can't do that" and just walked away from me.

* * * *

[3-63] Q Are all those people, Mr. Anderson, Mr. McPeak, Mr. Boninu, Mr. Bolinger, are they white or black?

A They are white.

Q Are you aware of any black people having received any help on tests at Lukens?

A None at all.

Q At any time?

A No.

* * * *

[3-68] Q How long was it after you had taken the test for second class and passed it that you spoke to Mr. Pilotti about the Foremen tutoring the other employees?

A That happened before I took the test.

Q But on direct I thought you said that you saw them tutoring that very same morning that you had taken the test?

[3-69] A That was before I took the test. We all took the test the same day.

When I saw—when they was up in the office I went out the shop and Pilotti was out there.

Q So you saw him immediately?

(Pause.)

A Yes.

Q And in fact, he went with you to the supervisor and complained about that, didn't he?

A No, he did not.

Q Didn't he go with you to the supervisor and make it clear that the union said if anyone got tutoring everyone should get it?

A I couldn't tell you. He never took me nowhere.

Q You passed the test when you took it, right?

A The second time, yes.

Q And you didn't lose any pay or any benefits as a result of the tutoring of the other employees; is that correct?

A That is correct.

* * * *

[3-71] KENNETH T. YOUNG, sworn.

* * * *

DIRECT EXAMINATION

BY MR. EWING:

Q Mr. Young, do you work at Lukens Steel Company?

A Yes, I do.

Q What job do you have there?

A Crane Operator.

Q When did you first go to work at Lukens?

A 1965, approximately June or July.

* * * *

[3-75] Q I would like you to look at Exhibit P-589. In 1969, after you went back there to work, did you apply to transfer to other jobs?

A Yes, I did.

Q What jobs did you apply to transfer to?

A Inspection Department, Millwrights, Metallurgical Testing.

Q Did the Employment Office or anybody else, any other Lukens' officials give you any response to those applications?

A Well, right off they offered me a Crane Operator's job. I refused it. I told them I didn't want to be a Crane Operator. They told me I would have to take a test for the other jobs.

Q Did you take a test?

A Yes, I did.

Q What was the nature of that test, do you recall?

A Basically the same written test, math questions.

Q True-false?

A Yes, I suppose so.

Q After you took the test did they tell you anything [3-76] about whether you could get the other jobs you had applied for?

A Pilotti told me I didn't pass the test. The guys said I had been working midnight and probably tired. He asked me if I had been reading lately.

Q Did they say anything about the tests that you had taken before and the test that you took now or your results were similar or different?

A Yes, he told me when I came out of high school I scored extremely high on the test and I asked him why I scored so high on the test why did I wind up a Grinder. He said he didn't know. He didn't work there at the time.

Q So after he gave you the test and told you you had done poorly, what happened after that?

A Well, he suggested I should come back in a week or so and take the test again.

Q Did you do that?

A Yes, I did.

Q What did he tell you about that?

A He told me I didn't pass the test again but they needed Crane Operators and I could be a Crane Operator if I wanted to.

* * * *

[3-81] Q When you went there in 1972 to the loading banks, were there any other black employees working on the loading banks?

A Not on my particular job, no.

Q Did you suffer any racial harassment during that time?

A Yes. I received a lot of static from the members of the crew.

Q Do you remember a man named Harold Trythall?

A Yes.

Q What was his position?

[3-82] A He was a Checker or a Shipper if you wish to call him that.

Q Did you have any incidents with him?

A Over a period of years we had several incidents.

Q Tell me about that?

A Well, like I said, we had several incidents. He became angry and called me a black sheep one day. Well, things just got back and forth where we couldn't get along at all.

Q Did you make any complaints to anybody about that?

A I eventually did.

Q To whom?

A I contacted NAACP after we had a confrontation in the mill in front of a large audience with the Crane Foreman and Harold and myself. I was informed about 20 minutes before the Crane Department showed up that they were going to come down and supposedly give me a good tongue lashing for, I guess, being at odds with Harold. So far as I knew the entire shop knew about it except for me. He showed up. It was quite an audience more or less waiting, hanging around. He began to—I think Harris was the Crane Foreman and who showed up and he began to reprimand me. We argued back and

forth and got into it pretty hot and heavy. He informed me he was giving me a verbal—giving Harold and I both a verbal warning and I asked him how could he give Harold a verbal warning when Harold wasn't in his department, he had no jurisdiction over [3-83] him. He said well, he was giving me one anyway. I said, "What you are doing is reprimanding me and not him." He says, "I am giving you one anyway." We argued some more and I became angry and walked away from him. Before that he informed me after informing me of my verbal warning, he informed me Harold Trythall would be watching me, Bill Valinsky would, Dunphy, who was the Shop Steward more or less set things up for Harold to go to the Crane Department complained about me.

MS. CLARK: Objection, Your Honor, unless a foundation is laid about his knowledge about Dunphy.

THE COURT: The objection is sustained unless it is established.

THE WITNESS: Well, Nancy Smith told me that Dunphy made the statement. "Kenny Young doesn't like the job working with Harold. Do you think I could get rid of him?"

BY MR. EWING:

Q Who was Nancy Smith?

A She had a job as Carman.

Q Was Dunphy there when you had this encounter with Mr. Trythall?

A And the Crane Foreman.

Q Yes.

A Yes. He was standing in the background.

[3-84] Q Did he participate at all?

A No.

Q Did he make any attempt to defend your interests?

A No, he didn't.

Q Was this before or after you went to the NAACP?

A Was the confrontation before or after?

Q Right.

A It was before.

Q What was the final resolution of the matter if there was one?

A Well, the Crane Foreman instructed me they would be watching me and if I could possibly get time off from work or lose my job, that is when I went to the NAACP because I felt my job was threatened.

THE COURT: He wants to know what happened thereafter?

THE WITNESS: Well, they set up a meeting. Harold was at the meeting, myself, Bill Whiteman who was Labor Relations.

BY MR. EWING:

Q I don't think we need the details of the meeting if you can tell me what came out of the meeting.

THE COURT: Were you fired or promoted or——

THE WITNESS: They put us on a different shift.

[3-85] THE COURT: When did all this happen about?

THE WITNESS: What year?

THE COURT: Yes.

THE WITNESS: Possibly around '75, I think. I am not sure.

THE COURT: Thank you.

BY MR. EWING:

Q While you were working on the 120 Inch Mill loading banks, right?

A Yes.

Q You started there in 1972?

A Yes.

Q Now, since that time have you had any problems or even before then with respect to overtime?

A Yes, I did.

Q What was that problem?

A Well, Jim Reese, well, he was Turn Foreman of the 120 loading banks. I, myself and Earl Riggins were the only two Crane Operators on that particular job. Into the periods when they had—the end of the periods, the fourth week when they do most of their shipping, they

had five, six or seven overtimes for the week and they would give Earl say four out of five and give me the remaining one.

Q Did you make any complaint about that?

A Yes. I talked to Jim Reese, the Foreman, several [3-86] times about it. He simply said, "Okay, we will take care of you." Bue he never did.

Q Did you speak to the union about it?

A Yes. I went to see George Barrage about it about three or four different times over a period of a couple of years and Barrage talked to the Crane Office about it and he talked to Jim Reese about it and they said they would straighten it out and they would for a short period of time and they would go right back to their old ways.

Q Did you subsequently file a grievance?

A Barrage warned them if they did it again I would file a grievance and a discrimination complaint. They did it again and we filed a grievance and a complaint.

Q Was the grievance and the complaint filed at the same time?

A Why yes. I went to the Union Hall to see Tom James. Barrage sent me to see Tom James to fill out a discrimination complaint. He said I would fill out a grievance first, "That way you would be entitled to your Crane Office overtime records." So I signed two blank forms at that time.

Q And do you know whether they were both filed at the same time?

A No. He said we would file the grievance first and if we didn't feel we received any justification from the grievance then we would file the discrimination complaint which we did.

[3-87] Q When was the grievance filed, do you recall?

A In '78, I think.

Q Did that result in a satisfactory outcome?

A No, not really.

THE COURT: Find out what did happen. Was there any adjustment made?

THE WITNESS: No, there wasn't.

BY MR. EWING:

Q Was there even a temporary improvement or some kind of improvement?

A Well, they did bring things up so far as overtime is concerned, even for the time being they have.

Q Was that overtime then given on the same crane or was there some problem about which cranes?

A Well, prior to my grievance and discrimination complaint I had to move around the company to get overtime where Earl received majority of overtime on our crane.

Q On the same crane?

A Yes.

Q Was there any reason why one was more desirable than the other?

A Why he never came right out and told me?

Q From your point of view?

A Yes.

THE COURT: You prefer doing it on your own [3-88] crane?

THE WITNESS: Yes, I would.

BY MR. EWING:

Q Was the discrimination complaint then filed?

A Yes, it was.

Q That was a complaint with the union, was it?

A Yes.

Q And when was that filed, do you recall?

A Probably a year after I filed the grievance.

Q That would be like the summer of '79?

A Yes.

Q Was that finally—was the matter finally resolved?

A Well, to a certain point it was due to the fact that from the time the grievance—I signed the blank form and the grievance was actually written up, it was written up instead of occurring over a period of years, it was written up occurring.

Q My question is: After the discrimination complaint was filed last summer now things are working right from your point of view, whether—

A It seemed to be going pretty even right now for the time being.

* * * *

[3-90] Q Mr. Wolbach and the two Messers. Boninu, are they white?

A Yes, they are.

Q How about Mr. Gay?

A Yes, he is white also.

Q Mr. McBride?

A Yes.

Q Trythall?

[3-91] A Yes.

Q Riggins that was on the crane, your crane on the other shift?

A Yes.

Q Mr. Dunphy, the Shop Steward?

A Yes, he is white also.

Q And who was your Foreman there, Mr. Reese?

A Yes, he is white, too.

* * * *

[3-97] BY MR. EWING:

Q Mr. Young, did you have a problem with the way that the union filled out your grievance with regard to the overtime?

A Yes. I attempted to say earlier from the time I signed the blank forms until the time the grievance was filled out my complaint was they weren't giving me the fair amount of overtime over a period of years. Unfortunately it was written up simply for one week during the year of '79. And that caused me to pretty much complain.

* * * *

[3-157] WILLIE STOKES, sworn.

DIRECT EXAMINATION

BY MS. GARTRELL:

Q Mr. Stokes, are you presently employed?

A No, I am retired.

Q When did you retire?
A 1977.
Q Did you work at Lukens prior to that time?
A I did.
Q What years did you work at Lukens?
A I started 1945.

* * * *

[3-186] Q When you went to Lukens in 1945, were the facilities in the plant such as locker rooms, lunchrooms and so forth, segregated by race?
A They were.
Q Do you know of anything that the union did throughout your years at Lukens to integrate those facilities?
A No, I don't.

* * * *

[3-194] WALLACE LEE PERRY, sworn.

DIRECT EXAMINATION

BY MR. BORISH:

Q Mr. Perry, by whom are you employed?
A Lukens Steel Company.

* * * *

Q Mr. Perry, when did you first go to work for Lukens?
A September 23, 1953.
Q I will first ask you, have you been employed by Lukens continuously from 1953 until today?
A Yes, I have.

* * * *

[3-201] Q Did you have any other problems with respect to layoffs that involved the pool?
A Yes. The time that I got laid off, it was five of us got laid off at the time.
Q Who were those five people, you and four others and who were they?
A Lester Davis.

Q What race is Mr. Davis?
A He is black.
Q What were the three others?
A R. McWilliams, white; Jimmy Canel, white; and McWilliams.
THE COURT: You gave us that one.
THE WITNESS: Eddie Williams.

BY MR. BORISH:

Q What race were those last three?
A Three white.
Q Now, all five of you were laid off from the same [3-202] seniority unit?
A Yes.
Q What seniority unit was that?
A Out of the Hot Top.
Q And where were the three whites sent?
A Two were sent to 26 Heating and one was sent to West Side to Tally.
Q Now, are those both seniority units?
A Yes.
Q Those were not pool jobs, were they?
A No, they was out of the pool.
Q And where were you and Mr. Davis sent?
A I was sent to 120 Scrap Hole, Shears.
Q Was that a pool job?
A Yes.
Q And where was Mr. Davis sent?
A 26 Labor.
Q What was the racial composition—was that a pool job also, 26 Labor?
A Yes.
Q What was the racial composition of the 206 Labor job?
A The 26, 100 percent black.
THE COURT: When did that happen, that layoff?
THE WITNESS: That was—that was after the [3-203] pool. That was around '63, '64.
THE COURT: Thank you.

BY MR. BORISH:

Q In terms of company seniority, how did you and Mr. Davis compare to the three white employees?

A I was the oldest and Lester Davis was the second oldest.

Q Where are those three white employees today?

A Still there.

Q Still where?

A The two are still in 26 and the one is a Foreman now, Eddie Williams.

Q They didn't come back to the Hot Top?

A No.

Q Did you complain?

A Yes.

Q What did you complain?

A I went to the union, it was the senior men who got laid off was supposed to get a place out of the pool if possible.

Q Senior men in terms of what?

A Oldest men being laid off.

Q In company time?

A Yes. He says, "That is not the way it is supposed to be. I will look into it."

[3-204] Q Did you ever hear anything further about it?

A No.

* * * *

[4-3] LYNN GREENBERG, sworn.

DIRECT EXAMINATION

Q Ms. Greenberg, are you a legal assistant in the office of Goodman and Ewing?

A Yes, I am.

* * * *

[4-14] BY MR. EWING:

Q This past December 13th, did you visit the office of Union Local 1165 in Coatesville for the purpose of examining and copying documents?

A Yes, I did.

Q Did the union provide transportation for you from there to the train station?

A Yes, they did.

Q Do you know who it was who took you?

A A union official referred to as Maldy.

Q Did you have any conversation with him?

A Yes, I did. He said to me when I got on his truck, "How can you stand all those blacks in Philadelphia?"

* * * *

[5-4] WILLIAM A. LAMBERT, sworn.

DIRECT EXAMINATION

* * * *

[5-20] Q About how many times were you laid off during the time period that you were a First Class Assembler?

A In my stay I guess maybe 14 times.

Q And where were you laid off to generally?

A Most of the time to the Labor, Miscellaneous Labor.

Q Do you know about how many times you were laid off to Miscellaneous Labor in the 14 times?

A About a dozen.

Q About a dozen. What job class did you go to?

A It is a 2 or 3.

Q Do you know of any other Assemblers who were assigned to the Labor Gang on layoffs?

A In my stay at Lukenweld, no.

Q Did you ever complain to the union about this?

[5-21] A Oh, yes.

Q Who did you complain to?

A Well, when we were notified, usually we are notified you would be laid off near the end of the week and I would talk to the union guys either—whichever one was in my department and usually it was John McGallen on our turn.

Q What was Mr. McGallen's response when you complained to him?

A McGallen would say, "Well, Bill, you are the highest paid colored guy in Lukenweld." He said, "Now,

you know there is only a couple jobs that colored guys can go to when you go into the big mill."

Q When you moved over into the big mill in the labor pool—

A Yes.

Q —did you talk to any Shop Stewards or union officials there about your situation?

A Yes, in the Labor Gang. We had John Robinson, Sr., who was a Shop Steward and I talked to him also. And he told me the same thing. He said, "Well, Bill, there is only a few jobs for colored guys when they come up here that they can take." This was it, the labor pool.

Q Mr. Lambert, did you ever complain to the union officials about the seniority system at Lukens?

A I talked to Shop Stewards.

[5-22] Q Did you ever talk to John McGallen about it?

A Oh, yes.

Q What was the nature of your complaint to Mr. McGallen?

A I asked him why it was that we had to go, guys that had a trade had to go up and get in the labor pool. Couldn't they do something about it. He said nothing he could do about it.

* * * *

[5-118] CHARLES GOODMAN, sworn.

* * * *

[5-170] Q Now, you don't know of any white employees who received better representation from the union than you did?

A Yes, a lot of them.

Q You don't remember the name of any single white employee?

A I couldn't give you the name because it has been a long time ago. But you can see, if you work there you can know what was going on.

* * * *

[5-174] SAMUEL H. BROWN, JR., sworn.

DIRECT EXAMINATION

BY MR. EWING:

Q You work for Lukens Steel Company now?
A Yes, I do.
Q When did you start there?
A July 2, 1957.

* * * *

[5-190] Q Now, you mentioned that Cornelius Thorpe had said to make sure your seniority gets straightened out. Was there a problem with your seniority?
[5-191] A Yes, there was.

Q Looking at Exhibit P-654, and comparing it with Exhibit P-655, is there a change there and if so, what and how did it come about?

A Yes. I went to my Shop Steward and told him that the seniority posting was wrong.

Q Why was it wrong?

A Because I was supposed to be behind Horace Lowery.

Q You said these people, Miller and others were put in there before you; isn't that right?

A Yes.

Q Who said you should be behind Horace Lowery?

A Well, that is the way it was over at the Employment Office.

Q That is what they told you?

A Clarence Wirth, he showed me Horace Lowery was first, I was second and Jack Miller was third.

Q Did you ultimately get that straightened out?
A Yes, I did.
Q How did that come about?

A I saw my Shop Steward and he filed a grievance for me.

* * * *

[6-27] DANIEL LONDON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SEGAL:

Q Mr. London, are you currently employed at the Lukens Steel Company?

A Yes, I am.

* * * *

Q When did you start at Lukens Steel Company?

A 1966.

* * * *

[6.28] Q Mr. London, focusing on the period in late February of 1975, what job were you occupying at that time?

A I was a handyman in the Locomotive Department.

Q In that period, were you working with a man by the name of Leon Bemenick?

A Yes, I was.

Q Was he white or black?

A He's white.

Q What job were you doing with him?

A We were working on a service truck, which consists of doing repairs on railroad cars in the field, rather than take them to the shop and tie up railroad cars; a little minor job.

Q How were you and Mr. Bemenick getting the tools with which you did that job?

A Well, I worked with him for a couple of weeks and I was always accustomed to him, and in the morning [6.29] I would go to the railroad yard where the major work is done and pick up tools needed to do a job. And then from there, going to do our jobs on specific railroad cars.

Q Who did you pick the tools up from?

A Paul Taylor.

Q Were they Mr. Taylor's tools?

A No, they're company tools.

Q Did Mr. Taylor see you when you and Mr. Bemenick got the tools?

A Yes, every morning.

Q Focusing now on—more specifically on March 3, 1975, did you follow this same pattern?

A Basically, but the only change there was the foreman, Lou Kornet, came to me that day and told me that Leon Bemenick was going to work at the rail yard with Paul Taylor, himself, and that I was to work on the service truck by myself.

Q What did you do then after he told you that?

A So I just took it for granted from past practices of the last two or three weeks that I was to go to the rail yard, collect the tools that I needed and go on the job.

Q And did you do that?

A Yes, I did. I went to the rail yard, but I [6.30] didn't get the tools.

Q What happened?

A Well, Paul Taylor denied me the tools.

Q What did he say?

A He said they are his tools and I couldn't use them.

Q What did you do then?

A I questioned him about it. I told him that I thought that they were company tools and that I'm normally doing what I had seen Bemenick do and heard that other guys did—went to the rail yard, collected the tools that were needed and so I'm doing the same thing and I asked him, why is he giving me the—he became very nasty in his attitude and I knew that I had just gotten into this department and the potential of a good paying job, and I didn't want to ruin my chances of losing this job.

So I just left and went around and was looking for cars that I would see that probably needed work on, later on, once I found some tools. So I rode around until coffeebreak time and I went back and had a cup of coffee.

After I came out of the coffee room, the foreman, Lou Kornet, came to me and told me that there was a change in the schedule again and I was [6.31] to go to Electric Furnace again instead of riding the service truck.

Q Did you ask Mr. Kornet at this time what his impression was as to the rule, as to whose tools they were and whether you would have access to the tools?

A Yes, I did because I was still a little confused as to what the story was to be on the tools, so I asked him just exactly whose tools they were and what tools I was supposed to use, and he said they were Lukens' tools and he asked me why.

I told him why. That I was denied the use of the tools from Paul Taylor. So he told me, well, just forget about it and go on down to the Electric Furnace. And he assigned a guy by the name of Sam Law to take me down, and when we got into the truck, I asked Sam Law to take me back up to the rail yard so that I could let Taylor know that I know that the tools aren't specifically his and that they belong to, you know, the company in general.

And I wanted to know just why, you know, he wouldn't allow me to use the tools that I knew everybody else was using.

Q And did you go back?

A Yes, we did. We went up and I got the truck and I went over and I asked him, again, why I couldn't [6.32] use the tools.

Q What did he say?

A He became very nasty again, started raising his voice and I told him—I just wanted to know what his reasons were for, you know, having this attitude, and that I didn't want any trouble. I just wanted to know, you know.

And so we, you know, argued like back and forth—more on his side. I wasn't looking for any trouble and he came out with the phrase, you know, you people are all alike.

So, you know, I asked him—I said, well, what do you mean by "you people"? He said, you know what I mean, you black bastard, and it was at that time that I hit him.

Q How many times did you hit him?

A Once was enough.

Q What happened then?

A He fell to the ground. He got up stumbling around.

Sam Law, the guy that was in the truck who took me up there, he came around. There was like a large pile of lumber separating us and he didn't really know what was going on. He heard a commotion and he came around and he asked me what was [6.33] happening. I told him. And he said, well, maybe we better go on down to the Electric Furnace. So from there we left and—

Q What happened later that day?

A Well, when I got to the Electric Furnace, it wasn't long before I got a call and I was supposed to come back up to the police station for a meeting.

Q Who attended that meeting?

A Paul Taylor, Leon Bemenick, Sam Law, myself, Lou Kornet, foreman, Al Carey, shop steward, Lionel Beck, supervisor.

Q Looking at Exhibit P-711—

A P-711?

Q P-711. That's a lucky exhibit.

The third page through to the last one is the summary of that meeting. It's four or five pages.

THE COURT: Is that what different people said at the meeting?

THE WITNESS: Yes.

THE COURT: Including your statement, right?

THE WITNESS: Yes.

THE COURT: The account that you gave at that meeting is substantially accurate, to the [6.34] best of your knowledge?

THE WITNESS: Yes, it is.

BY MR. SEGAL:

Q What was the result of that meeting?

A Lionel Beck told me that he was going to have to give me four days suspension and three years probation.

Q Did he say anything about the impact on him, of you being called a black bastard?

A The impact on—

Q The impact on Lionel's decision, whether that affected his decision to give you four days?

A No. He said it was something that he had to do. I hit the guy and he didn't say anything about the guy calling me names.

Q Did you go to the union after that?

A Yes, I did.

Q When?

A At the end of that day.

Q Who did you go to—who did you see?

A I talked to Bennie Pilotti and Mr. Brown.

Q And you described the incident to them?

A Yes, I did.

Q Including everything?

A Everything.

[6.35] Q They filed a grievance?

A Yes.

Q Looking at Exhibit—at 710, that reflects the grievance they filed?

A Yes.

Q Do you know why in that grievance, as stated there, the statement—your defense of what this fellow had called you isn't offered at all?

A No, I don't.

Q Do you know why it isn't mentioned at all?

A No, I haven't the slightest idea. Because I know I explained the whole situation to him.

Q Had you ever been involved in any fighting incident at Lukens before that?

A No, I haven't.

Q Have you ever been involved in any fighting incident at Lukens since then?

A No, I haven't.

* * * *

[6.41] THE COURT: Did you make any inquiries as to why no disciplinary measures were taken against Mr. Taylor? Did you ask the union to check into that?

THE WITNESS: Yes. After I was interviewed at the police station, my main question was that, you

know—I know that I have to have time off, but I couldn't understand why there was nothing being done with Paul Taylor, since he was the one who provoked me, you know, to do what I did because it would have never happened if he didn't provoke me with racial slurs.

* * * *

[6.59] JAMES F. WORTHY, sworn.

DIRECT EXAMINATION

BY MR. EWING:

Q When did you work for Lukens Steel Company, Mr. Worthy?

A I start working for Lukens Steel Company in 1943.

Q And when did you leave there?

A In April, 1977, '76.

* * * *

[6.61] Q You first applied to Lukens in 1943, did you?

A That is correct.

Q Did you ask for any particular job?

A No, I didn't.

Q Were you offered any choice of job?

A No.

Q And what job did you take?

A I was given a job in General Labor.

Q Working in General Labor, did you work all over the mill?

A Yes, I did.

Q Were you able to observe areas of the mill where predominantly black people worked?

A Yes.

Q And what were they?

A From what I observed, if it wasn't in General Labor, it was a Track Gang, if it wasn't a Track Gang a Stocking Gang or Scrap and By-Products and Shear Line on the 140 Mill and same 120.

[6.62] Q What about the Open Hearth Pits?

A Yes, also the Open Hearth Pits.

Q Bricktenders?

A Bricktenders also.

Q Conductors?

A This is true.

Q Were there any other blacks working in Lukens?

A In other areas it was just a token thing. When it came to the hard work, the menial work this is where you find it was predominantly black.

Q Were there any black people working in skilled jobs when you started at Lukens?

(Pause.)

A Just about as many as you can count on one hand.

Q Can you tell us who any of them were?

A I see there was a man of Percy Watford who worked on the Open Hearth Floor and I think at that time back in the '40's a man by the name of Jock McNeil who worked in the Machine Shop, Lukenweld.

Offhand I can't remember anybody else.

Q Was there anybody in the Riggers?

A Oh, yes, a young man in the Riggers, they call him "Smokey." His real name I don't know.

Q Can you compare the jobs that you mentioned that were predominantly black, compare those jobs to jobs held by white [6.63] people with regard to the amount of physical effort that was involved?

A On any one of those jobs that were mentioned here they were all physical, any of those jobs, the Labor Gang, it was physical; on the Track gang, it was physical; and Brick Shear, it was physical; Open Hearth, physical; the same on the Shear Line; in the Scrap, it was nothing just back-breaking hard work. This is all we could get.

* * * *

[6.87] WILFRED L. MAYFIELD, sworn

DIRECT EXAMINATION

BY MR. SEGAL:

Q Mr. Mayfield, are you currently employed at Lukens Steel Company?

A I am.

Q When did you first begin your employment at Lukens?

A August 3, 1950.

* * * *

[6.95] Q Do you know a man by the name of Cliff Wilson?

A I do know Mr. Wilson.

Q Did Mr. Wilson bring you a problem as Shop Steward?

A He did.

Q Can you describe the problem he brought you?

A He and another employee was assigned to the Navy Armor [6.96] Building and it ran short of work so the Foreman sent them back to Nickel Cladding to be assigned.

Q Do you know who the other employee was?

A Dick Murray.

Q Is he white or black?

A White.

Q And Mr. Wilson?

A Black.

Q Go ahead.

A When they reached Nickel Clad he had work for a Grinder but no Condition Leader. They sent Wilson home and let the Condition Leader move down and work in Wilson's place.

Q Did you go with Mr. Wilson to Mr. Diem?

A I did.

Q What happened?

A We went in and Diem said he wasn't going to pay him.

Q Did you go to see anyone in the union about the problem?

A I did. I went to the Committeeman, Mr. Books.

Q Was he white or black?

A He is white.

Q And what did Mr. Books tell you?

A Mr. Books say that was a violation and that he was going to file a grievance.

Q Did he give you anything at that time?

A Not that day he didn't.

[6.97] Q Did he give you anything the next day?

A The next day he did.

Q What?

A A grievance.

Q What were you to do?

A Take it back to Norman Diem, get him to put a number on it and answer it.

Q Did you do that?

A I did that.

Q And what was Mr. Diem's response?

A He wouldn't answer it. He said he would want to talk to Books before he answered it.

Q Did he talk to Books, do you know?

A I went—yes, he did talk to him.

Q How do you know that?

A Well, Books say he did and he say he talked to Books.

Q And what was the result? Was the grievance filed? What happened?

A Mr. Books told me that he was going—I went back to Mr. Books and I told him what Diem said. Books said, "Forget about the grievance because I am going to agree for it to be settled."

Q Then what did you say?

A I told him this was wrong because Wilson had a day's pay coming to him.

[6.98] Q And what was his response?

A He said, "Well, I agreed to settle it." And I went back to Norman Diem and Diem told me, he said, "Well, Books is your superior in the union" and he said, "I am not going to pay it," and he said, "If it comes time I have to give a day's pay I will give it to a white man before I give it to a nigger anytime."

Q Do you remember those words?

A I remember those words.

THE COURT: About when was that?

THE WITNESS: I beg your pardon?

THE COURT: About when did that happen?
THE WITNESS: That happened near the '70's.

* * * *

[6.111] Q Mr. Mayfield, bringing you further up timewise to about 1978, did you begin experiencing some scheduling problems?

A I did.

Q Can you tell us very generally what those scheduling problems were?

A Yes. I will try to be brief. More or less it was—the whites in my department was getting more benefit out of the schedule than the black employees.

Q And what benefits in particular were they getting?

A Increase in operation. I will try to outline this very briefly.

Q Okay.

A My first job preference I am the second. The second job I am the oldest man on the job. When I go to relieve on the first preference job, I have to start on midnight and the older man work 4:00 to 12:00. When I bump back to the second preference job I am the oldest man. They tell me I had to work midnight because I am the oldest.

Q You were working midnight even though you had different seniority?

A That is right.

Q Did you talk to anybody about this in the company?

A I first talked to my supervisor.

[6.112] Q Who is that?

A Mr. Glazer.

Q Is he white or black?

A He is white.

Q What did he say?

A He told me, "Mayfield, I know the way the computer is set up, that it discriminates against the black employees." He said, "But I don't have the power to change it." He said, "If you will go to the union, get someone from the union to come in and sit down to talk

to me, I will be glad to change it." He said, "No problems."

Q Did you go to somebody in the union?

A I did.

Q Who did you go to?

A I went to Committeeman Ronnie Patton.

Q Is he white or black?

A He is white.

Q Did you tell him the problem?

A I told him the problem.

Q What was his reaction?

A After two trips to Glazer and two trips back to Patton, nothing happened.

* * * *

[6.119] Q Do you recall when you became a union Shop Steward?

A Oh, I suppose around '60's, I guess, 1960.

Q Do you remember for how many years you remained a union Shop Steward?

A About six or seven.

Q So that it would be your estimate then that you were a Shop Steward from 1960 until 1966 or 1967; is that right?

A Yes.

* * * *

[6.121] Q Now, the incident that you described involving Cliff Wilson—

A Yes.

Q —that happened while Books was a Grievance Committeeman?

A It happened while Books was the Grievance Committeeman.

Q Is it possible that incident occurred some time [6.122] between 1962 and 1964?

A It might have.

Q But you are positive that it happened while Books was the Grievance Committeeman?

A I do know it happened while Books was the Grievance Committeeman.

* * * *

[7.3] PAUL RICE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * *

[7.34] Q You're presently a shop steward now, Mr. Rice; is that correct?

A Yes.

Q And you were appointed to that position in [7.35] 1972 by a white assistant committeeman?

A Yes.

Q In that position, one of the things that you do is to represent employees in your department who have complaints against management based on race discrimination?

A Yes.

Q And, as a matter of fact, in that capacity, you have handled grievances for other black employees who allege that they were discriminated against because of their race?

A Yes.

Q And you have achieved satisfactory results for several of employees in those complaints, haven't you?

A Yes.

Q In handling complaints as a shop steward, you've received instructions that you're to handle complaints of black employees and white employees exactly the same; isn't that right?

A Yes.

Q And that if you have a complaint of race discrimination; which you can't handle in the shop, that the proper course of action is to refer it to the Civil Rights Committee; is that right?

A Yes.

* * * *

[7.37] JOHN C. McNEIL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EWING:

Q Mr. McNeil, what's your present occupation?

A I'm with the Department of Health, Safety Inspector.

Q Did you retire from Lukens in 1972?

A I did.

Q When did you start to work at Lukens?

A November 1942.

* * * *

[7.85] Q Now, during the time that you worked in the machine shop at Lukens and since '61, have they had apprentice programs?

A At Lukens, yes.

Q And how many people had started in those programs since you came in there in '61?

A In a class, you mean?

Q How many altogether, between '61 and the time [7.59] you left in '72?

A I would say, maybe thirty, thirty-five.

Q And how many of them were black?

A Only one.

Q Who was that?

A A fellow by the name of Bush, Ken Bush.

Q Did you make any efforts to recruit more blacks into that program?

A I did.

Q What did you do?

A Every time I heard that they were going to put on an apprentice program—start an apprentice program, I went to the union official, Ike Whitaker, and asked him if he could find some black boys that graduated from high school that were good, was prepared for a task to come into the machine shop.

Q What was his response to that?

A Ike told me that he had sent several fellows over to the employment office to sign up.

Q Uh-huh?

A And he said that when he followed through on it, the company told him that none of them passed the test.

Q Did he say he'd do anything more about it?

A No, he didn't.

[7.60] Q From your experience, did you teach people in this apprentice program?

A Yes. At Lukeweld, I talked to the operators who wanted to become a machinist. They were allowed so many operators to one machine, which I was to help train the operators and the apprentice boys.

Q At Lukens, when you were working as a machinist?

A Yes, I trained several of the young white machinists.

Truthfully, I don't even see how some of them got out of high school.

* * * *

[7.81] THOMAS RYAN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * *

Q From 1954 until 1979, were you the manager of Labor Relations at Lukens Steel Company?

A I was.

Q In that capacity, you were responsible for all labor negotiations with the union, were you?

A With the exception of the first one in 1954.

* * * *

[7.88] Q Now, during your twenty-five years with chief labor negotiating for Lukens, the company from time to time proposed mergers of various seniority subdivisions, didn't they?

A Yes, sir.

Q With respect to all of those mergers, the only reason for the mergers, as far as you know, is to achieve greater flexibility for management; is that right?

A That was our intent.

* * * *

[7.108] Q Now, you're aware, aren't you, that at one point in time you, while you were working for Lukens, the locker rooms were segregated on the basis of race?

A I know of one locker room that was all black, but that was by choice.

THE COURT: Whose choice?

THE WITNESS: The employees' choice, sir.

BY MR. BORISH:

Q Let me show you a copy of a letter that's been marked as P-107.

Would you read that, please? Did you have a chance to read that letter?

A Yes.

Q Do you have any recollection of writing that letter, Mr. Ryan?

[7.109] A No, I don't, but I certainly wrote it. This has my signature.

Q And do I take it from your previous testimony that, as far as you know, the locker rooms at Lukens have never been intentionally segregated on the basis of race?

A As far as I know, it was by choice and by impression formed.

Q I'm not talking about choice now. I'm talking about intentional segregation by Lukens.

As far as you know, were any of the locker rooms at Lukens intentionally segregated by Lukens?

A No.

THE COURT: When you say by choice, do you mean the white employees chose to keep the Negroes out of their locker rooms?

THE WITNESS: The blacks chose to keep the whites out of there.

THE COURT: The company didn't interfere with either—

THE WITNESS: No, sir.

BY MR. BORISH:

Q Now, the one locker room that you're referring to, is that the same group of buildings that's [7.110] referred to in this letter, P-107?

A Plants 1, 2 and 3 of Pressed and Formed Products area. I'm talking about the Pressed and Formed Products area.

Q In the last—next to the last paragraph of the letter, you state that, "The company and informed local union representatives expect an expression and reaction of discontent because of the personnel movements required for the integration of employees in this area and the manner in which this discontent may be displayed cannot be predicted at this time."

From whom was that expression of discontent required?

A It was expected from the employees who use the locker room on the first floor. I don't know whether it was Building 1 or 2 or 3 of the Pressed and Formed Products, but they liked their locker rooms. They didn't want it changed. It was very convenient to the work place and they were resisting a change, which meant a locker room some three hundred yards removed from one that was maybe only ten yards from the work place.

Q Did you expect any expression of discontent from white employees?

A No, sir.

[7.111] Q You only expected it from black employees?

A That's right.

Q How do you know?

A As a matter of fact, the whites were cleared out of their locker rooms and were up at the new locker rooms, I believe, before the blacks got in there.

Q Mr. Ryan, what led you to believe that there would be an expression of discontent from the black employees?

A Well, I could hear what supervision was telling me, that they're darn unhappy about being moved.

Q Did you ever hear any black employee, that he was darn unhappy about being moved?

A No, sir.

Q Mr. Ryan, do you have any idea why a nondiscrimination clause was not put in Lukens' collective bargaining agreement in 1962?

A No, sir. The only thing I can say, it came out, and I guess we just missed it in, needed the item, but I never felt that was any great problem since it was our policy, only.

Q The addition of such a clause was discussed at company negotiation committee meetings, wasn't it?

A I don't recall whether it was or not, but we were obligated to put it in, as it was part of an [7.112] industry settlement.

Q And failed to do it?

A We missed it.

Q Well, I just want to get on the record whether you know that it was discussed at company negotiation committee meetings? Was it or wasn't it?

A It probably was.

Q Well, let me—

A This is no great deal for us. We had the policy.

Q Let me show you some documents to establish conclusively that it was discussed.

A I won't argue with you.

THE COURT: He's agreeing with you. I think those documents speak for themselves anyway. Let's move on.

* * * *

[7.114] Q Let me show you a document that was marked as Plaintiffs' Exhibit 15.

May I ask you to read the first two pages of that? Well, actually, to save time, all you have to read is paragraph 2A and then paragraph 7A.

THE COURT: Increase in job classifications.

BY MR. BORISH:

Q Do you remember back in 1965 the job classification of the trade and job class were increased to two jobs?

A Job classes were increased by two job classes throughout the industry.

Q And under this supplemental agreement on page two of paragraph 7A, those arrangements that are being talked about in that paragraph, you understood those to include the use of the Wonderlic test as [7.115] an admission requirement into those trade and craft jobs, didn't you?

A I can't say that I did.

* * * *

[7.124] Q Now, regarding the questions you were asked about testing and Exhibit P-15, I will show you a copy of a document I have marked Union 443 and ask if you recognize that. (Handing witness.)

A I do recognize this document covering union proposals for the negotiations of 1965.

Q And I call your attention to Page 2 of that document to the Paragraph numbered 20. Is it a fact that the union proposed that the company eliminate all tests in the 1965 negotiations?

A Yes, they did.

Q And is it also true that the union expressed to the company at various times its objections to the use of the Wonderlic Test for entry into trade and craft jobs?

A That is correct.

Q And the craft testing that you understood the union [7.125] not to disapprove or not to object to was the testing for upgrading within a craft from Craftsman "C" to Craftsman "B" to "A"; is that right?

A That is correct.

Q And the Wonderlic Test was not used for that purpose; is that right?

A No, sir—no, ma'am, no person—

THE COURT: Just say not at all.

BY MS. CLARK:

Q Mr. Ryan, on P-15 which you were shown on direct examination, do you recall now what we are looking at?

(Handing witness.)

A This was about the reclassification, wasn't—

Q In Paragraph 7 which your attention was directed to which uses the term "The arrangements heretofore in effect for entrance into a craft job."

Is it possible that that term refers not to testing but to the practice of allowing Craft Helpers to move up into a craft job regardless of whether there was a vacancy in that craft job?

A We permitted people to move up from Helper to the craft starting level, "C" level, whether or not there was a vacancy.

Q It is possible the term "arrangements" in this memorandum was used to refer to that practice rather than to [7.126] testing practices?

A I can't say for sure, it could be.

Q In any case, whatever this meant it was your understanding that the union was not giving up its right to object to the use of tests or to file grievances over them if they were used in these jobs; is that right?

A The union did not give up the right to protest.

* * * *

[7.128] Q Okay. Now, Ms. Clark showed you a set of union [7.129] proposals in 1965 in which the union proposed to eliminate all testing. The union proposed that again in 1968, didn't they?

A I am not so sure they didn't propose it every year, every time we negotiated.

Q Let me show you a document that has been marked as Plaintiff's Exhibit 217 and I will refer you to the third page of that. It is minutes of the company union negotiations, the seventh meeting in 1968.

Does that refresh your recollection at least in 1968 the union also proposed to eliminate all testing?

A Yes.

Q And do you remember that the company's—one of the company's responses was that the company felt that the union was arguing for a minority group in making this proposal?

A Yes, I do recall that.

* * * *

[7.133] J. LOUIS IRWIN, sworn.

DIRECT EXAMINATION

BY MR. BORISH:

Q Mr. Irwin, are you presently employed by Lukens Steel Company?

A My last day of work was January 31st of this year.

Q And from 1954 to 1979 were you in charge of industrial relations at Lukens?

A Up until a year ago, yes.

* * * *

[7.146] Q Didn't it take seven years to desegregate the locker rooms from the time the company first said it was going to institute a plan to do so?

A That particular locker room, no, I can't believe that.

Q All the locker rooms. Didn't the company say that it was going to desegregate the locker rooms in 1959 and didn't it take until 1966 at least until the locker rooms were desegregated?

A That could be, yes, plant-wide, that could be.

* * * *

[7.148] Now, what is your question?

Q Doesn't that refresh your recollection that the original plan to integrate the locker rooms at Lukens was formulated back in 1959?

A Yes.

Q But in 1966 didn't the company ask the union to postpone desegregation?

MR. LANDIS: Of what?

BY MR. BORISH:

Q Of the locker rooms.

A Did what?

Q Postpone desegregation.

THE COURT: Delay.

THE WITNESS: If so, there were reasons for that and not unilaterally company judgment.

BY MR. BORISH:

Q Well, whose judgment was it other than the company's?

A I would like to use an example. I can picture one locker room, one building relatively small with a partition. Both groups objected to integration. We delayed that until we developed a plan and the plan was really very simple. We just tore the partition down. It was a cement block, took every one out, painted it, renovated it, took the partition out and assigned all of the employees in a mixture way.

Now, that is an example of this possible [7.149] delay. We did not want a confrontation. We wanted results.

Q Who told you that there might be confrontation?

(Pause.)

A First, I wouldn't recall anyone, probably from the Foreman, probably from some of the people who were in that locker room.

Q You don't recall any of their names?

A Any names, no, I don't. I recall the incident very well.

* * * *

[7.151] Q You don't know why a non-discrimination clause wasn't included in the 1962 collective bargaining agreement, do you?

A No.

Q But before such a clause was added to the 1965 agreement, isn't it correct that a Government investigator recommended that such a clause be added?

A No, I don't recall that but I will support the comments that Mr. Ryan made earlier.

Q Well, we didn't talk about this with Mr. Ryan earlier. I want to know whether before it was added finally, such a clause was added in 1965, that came after a Government investigator had recommended that Lukens add such a clause to its collective bargaining agreement?

A I don't recall because I don't recall a Government representative.

Q Let me show you a document that has been marked as Exhibit P-87. (Handing witness.)

If you would look at the only last two pages. The first page was on there when we got the document from the company.

[7.152] (Pause.)

The language is on the second page of the memorandum, the third page of the document.

(Pause.)

A Yes.

Q Do you see where it says "We agreed that a nondiscrimination clause should be inserted in the next labor agreement?"

THE COURT: We agree that a discrimination clause.

MR. BORISH: A discrimination clause.

THE COURT: I don't think that is what they meant.

THE WITNESS: Yes, I see it.

BY MR. BORISH:

Q Does that refresh your recollection at all about whether a Government investigator suggested that such a clause be included before it was finally included?

A Well, I do recall now that I see it, I remember the name of one.

Q He was there in connection with Government contracts to Lukens Steel; isn't that right?

A That is right. I remember that. I remember meeting with him. The detail of this report I don't recall. This was 16 years old.

* * * *

[8-14] JOHN BAXTER, sworn.

DIRECT EXAMINATION

BY MS. GARTRELL:

Q Mr. Baxter, what is your present occupation?

A I am a body and fender mechanic.

Q And where are you a body and fender mechanic?

A Dallas, Texas.

Q How long have you been in Dallas?

A Three years.

Q Did you work at Lukens at one time?

A Yes, I did, twice.

Q Would you look at what we have marked in your folder that I have handed you as the first document, P-807 and tell me if as far as you know that is your employee record card from Lukens Steel Company?

A Yes.

Q You worked there for a while up until '48-49 and you left the company and went back in 1970?

A That is correct.

* * * *

[8-29] Q When you were there in 1949 did you protest to anybody at any time the fact that the locker rooms were segregated and the bathrooms were segregated?

A I can't recall what exactly was said but I did talk to one of our Shop Stewards, Harry Reeder.

MS. CLARK: Objection, Your Honor, on the same ground as before.

THE COURT: Same ruling as before, namely no ruling yet.

BY MS. GARTRELL:

Q Do you remember if he had any response—what did you say to him?

A I said, "Harry, why do we have to be in these locker rooms with all colored," used the word colored, "and all the whites over there?" He said, "That is the way it is, son."

* * * *

[8-30] Q You spent some time while you were employed between '70 and '77 in the pool, in a pool job. Do you recall that?

A Yes.

Q Was the pool used by the company to discriminate against black employees?

MR. KLUGHEIT: Objection, Your Honor.

THE COURT: Objection to the form of the question sustained.

BY MS. GARTRELL:

Q Did you observe any discrimination in assignment to pool jobs upon layoff?

A Yes.

Q What kind of discrimination?

A As I said before, the blacks usually went to the Track Gang and the whites were assigned jobs in other areas.

Q Was it your observation that blacks were generally assigned to the pool initially when they were hired?

A Yes.

Q Do you know if any blacks protested about that practice?

A Would you ask me that question again?

[8-31] Q Do you know if any black employees protested that blacks were disproportionately assigned to pool jobs when they were first hired?

A Yes. On numerous occasions I know even at the union meetings they used to talk about it.

Q At union meetings when that subject came up, what was the response of the union officials?

MR. CLARK: Objection, Your Honor, on the same ground.

THE COURT: You have a continued objection on a continued deferred ruling.

MS. CLARK: Thank you, Your Honor.

THE WITNESS: The union used to always say the pool was to protect the job, keep you from getting laid off out in the street.

BY MS. GARTRELL:

Q Is it your testimony that the union defended the pool?

A Oh, yes.

Q Did the subject of race discrimination against employees at Lukens come up at any union meetings at which you were present?

A There was one union meeting that I attended. I didn't attend too many of them. There was one I attended when a gentleman, I don't know who he was, I don't even know his [8-32] name or anything, where he got up and he started to talk about the racial discrimination on the West Side. Mr. Cavuto told him to see his Committeeman. When he tried to discuss it further he was told he was out of order.

Q Who told him?

A DePedro.

Q Who is DePedro?

A I think he was the Secretary.

Q For the entire time you were at Lukens in the '70's, were you a local member of 1165?

A Yes, I was.

Q Were you aware of any efforts by the union to improve or increase job opportunities for black employees?

A No, I was not.

* * * *

[8-39] Q Mr. Baxter, the conversation you reported to Harry Reeder occurred during the first part of your employment at Lukens?

A That is right.

Q And Mr. Reeder is black?

A Right.

Q You described various occasions people were laid off and saw white employees going to certain parts of the mills and black employees going to other parts. You are familiar with the contract provision employees on layoff to exercise job claims on layoff where they worked previously?

A Yes.

* * * *

[9.98] JOHN MUHS, sworn.

DIRECT EXAMINATION

BY MR. BORISH:

Q Mr. Muhs, you are presently employed by Lukens Steel Company?

A Yes.

Q And what job do you presently hold?

A I am supervising Engineer of Appropriations.

Q And since 1972 have you been involved at Lukens in overseeing how the company spends it money for capital investment?

A Yes.

Q Now, from 1958 until the early 1970's, were you an assistant to Mr. Tom Ryan who testified here last week in the Labor Relations Office?

A Yes.

THE COURT: He testified in the courtroom.

MR. BORISH: Yes, thank you.

BY MR. BORISH:

Q And in that capacity did you participate in formulating company strategy, negotiating, to be used in negotiating sessions with the union?

A I did research and supplied ideas, feedback from both union representatives and employees within the bargaining unit. [9.99] If that constitutes—formulating strategy, yes.

Q You were also a member of the internal company Negotiating Committee, were you not?

A Yes.

Q And from 1959 through 1971 you participated at the bargaining table, didn't you?

A That is correct.

* * * *

[9.120] Q Nonetheless, you wrote another memorandum about a year and a half later in which you also talked about past racial discrimination. Isn't that right? Let me show it to you. It has been marked as Plaintiffs' Exhibit 70. (Handing witness.)

A I wrote this.

Q Looking down at the fourth paragraph, is it your testimony that you were once again inaccurate—

A Yes.

Q —when you referred to remnants of past racial discrimination?

THE COURT: He didn't. He said past discrimination.

BY MR. BORISH:

Q Remnants of past discrimination. You were inaccurate again?

A Yes. I have a stubborn streak.

Q Yes, did you ever conclude it was a mistake that you kept writing these memoranda?

[9.121] A Yes, it was.

Q It was a mistake?

A This proceeding makes it a mistake, yes.

Q I am correct, am I not that Mr. Mulligan, to whom this memorandum was sent, he is the company general counsel, in-house?

A That is correct.

Q Do you recall any response from Mr. Mulligan to this memorandum?

A No, I do not.

Q He never called you back and asked you, "John, what are you talking about when you refer to remnants of past discrimination?"

A I do not recall any response like that.

Q As a matter of fact, you don't recall any response from anyone who is listed as having received a copy of this letter, do you, telling you anything you wrote in there was inaccurate?

(Pause.)

A No.

Q Including Mr. Ryan. Isn't that right?

A No, no. There were times when Mr. Ryan commented that I was persistent.

Q By the way, looking back to the first page where in the fourth paragraph the document states the basic objective of the committee was to afford greater opportunity enjoin [9.122] enrichment and goes on to state it was unofficially to overcome the remnants of past racial discrimination still preserved by our current seniority system.

You conveyed that unofficial purpose to the union of the subcommittee, didn't you?

A Yes.

Q And you were told by Mr. Brown, the union Chairman of the Subcommittee, the President of the Union would not let the union members meet to continue this dialog?

A Yes.

* * * *

[9.123] Q And do you recall there was a group of employees from the Open Hearth Pit Subdivision that complained to you about lack of promotional opportunity and about initial assignment to the Pit Subdivision because of their race?

A Among a lot of other subjects; yes.

Q Those were two of their complaints, weren't they?

A Yes.

Q Looking over at the board here that we have set up, that subdivision was pretty heavily black, wasn't it, in those days?

A Yes.

Q As a matter of fact, in 1978 there were only 30 blacks [9.124] and only two whites in that subdivision?

A I can't testify to the composition of that subdivision in 1978.

Q Those employees told you they didn't want any record kept of this complaint; isn't that right?

A They didn't want any record kept of all of our conversations. They were distruthful of institutionalized problem solving. They wanted to talk directly to somebody who might use some indirect means about solving their problem.

Q They were also talking about repercussions from supervisory personnel if they found out they were complaining; isn't that right?

A That was one of the bases of their request for security, yes.

Q Why do you think they came to see you?

A Because I was on the bottom of the totem pole.

Q You were the least threatening?

A I guess so, yes.

Q You concluded their complaints of racial discrimination were unfounded, didn't you?

A When I tried to pursue their claims regardless of the channel they suggested or whether it was a channel of investigation that I designed, the trial always grew cold. I couldn't get it back.

Q Who did you talk [illegible] about these complaints?

[9.125] A All kinds [illegible] ent people, union representatives, company—salar d employees, hourly employees, all kinds of people.

Q You don't remember any names?

A I could recall them if I [illegible]w the seniority list in front of me. I could pick them out. There were 3,000 people in the bargaining unit. I don't know a lot of them. I have seen a lot of familiar faces in the couple days I have been here but it was a 10-year gap or a 9-year gap between my being thoroughly involved in that and now.

* * * *

[9.136] JAMES L. THOMPSON, sworn.

* * * *

DIRECT EXAMINATION

BY MS. GARTRELL:

Q Mr. Thompson, were you employed by Lukens Steel Company?

[9.137] A Yes, I was.

Q From 1955 until 1973?

A Yes.

* * * *

[9.141] A That was the Pickling Tanks—I am not too familiar with all departments over there.

Q Was By-Products over there?

A By-Products.

Q Green Anneal?

A Yes. Those were some of them.

Q Navy Building?

A Yes.

Q How long did your committee operate?

A Our committee operated, I don't believe it was quite two years, over a year, maybe a year and a half.

Q Were your discussions with Mr. Ryan along the same line as you have told us your discussions were with Mr. Muhs?

A Yes, they were.

Q Did you feel at the end of your committee's functioning that the committee had accomplished what it set out to do?

A I felt that our committee was a failure.

Q Did you feel that you were able to convince Mr. Muhs that in fact discrimination on the basis of race existed and was a problem at Lukens?

A No, I did not.

* * * *

[9.137] Q Were you a member of a self-appointed Ad Hoc Committee of black employees at Lukens Steel Company in the 1960's which presented to Mr. Muhs a number of complaints of racial discrimination?

A Yes, I was.

Q Who was on that committee?

A That committee consists of Donald Parker, Isaac Smith, James Hines, Carl Cannon, Alphonso Jones and I.

Q Were all of you black employees in the Pits in the Open Hearth section?

A Yes, we were.

Q How did you come to form that committee, Mr. Thompson?

A Well, we were dissatisfied with the conditions that [9.138] existed at Lukens. So we thought we would do something about it by forming our own committee to see if we could get some results.

Q Who did you go to with your complaints?

A Our first initiation of our complaints we went to our immediate supervisors and then we saw that they didn't have the power to do anything about it or wouldn't take the power. So we thought we would take it further. So we thought we would go to Labor Relations which consist of Tom Ryan and John Muhs.

Q At that time?

A Yes.

Q And did you go to both of these men?

A Yes, we did.

Q Did you see them separately or together?

A Well, sometimes we would see them separately, sometimes we would see them together but most of the time we would see them together.

Most of our get-togethers were with Mr. Muhs.

Q How many meetings did you have with Mr. Muhs, where were they held and how long were they?

A Sometimes our meetings were held at Mr. Muhs' office over at Strode Avenue, and we would have meetings at Strode Avenue at personnel in the conference

room, consisting of Mr. Muhs, Mr. Ryan, our immediate supervisor and other personnel that belonged to Lukens in the official capacity.

[9.139] Q Were those lengthy meetings?

A Some of them were two and three hours, some were three and four.

Q Now, what was it that you put on the table in front of Mr. Muhs?

A Well, we put on there about segregated washrooms and the denial of promotion to the blacks. These were two of the things that we put on the agenda.

Q Did you protest about promotions to salaried jobs?

A Yes, we did.

Q [Foreman] jobs primarily?

A Yes.

Q Did you protest about the company's failure to hire blacks into other salaried departments and other salaried jobs?

A Yes.

MR. KLUGHEIT: Your Honor, I will object and ask the Court instruct Ms. Gartrell not to use leading questions.

THE COURT: Try not to use leading questions.

BY MS. GARTRELL:

Q I want you to tell the Court as nearly as you can remember everything you complained about to Mr. Muhs that had anything to do with racial discrimination. First of all, was the complaint of this committee and the business of this [9.140] committee solely concerned with the racial discrimination at Lukens?

A Yes.

Q What were your complaints?

A Our complaints were concerning the wash houses, facilities, our complaints were the hiring practice they had and promotional practice in our department, which was the Open Hearth Pits, Melting Department, Personnel Department, Carpentry Department, the Paint Shop,

the Machine Shop. Those are some of the complaints that it centered around.

Q Did Mr. Muhs believe you when you told him that there were segregated facilities, locker rooms, washrooms and so forth?

A No, I don't believe he really did.

Q Did you take him on a tour in order to show him segregated facilities?

A We took Mr. Muhs—we complained. We got complaints from those on the West Side. So we brought our complaint to Mr. Muhs and told him where this initiated. So we took Mr. Muhs over on the West Side for him to see for himself.

Q Did he believe you then?

A I don't believe he did.

Q Did he do anything about them?

A Not to my knowledge anything was done.

* * * *

[9.170] BY MR. SILBERMAN:

Q Mr. Thompson, of the four other people on the informal committee besides yourself, did any of them hold any positions in the union?

A Carl Cannon and James Hines were Shop Stewards as far as I know.

* * * *

[9.196] JAMES L. DAVIS, JR., sworn.

DIRECT EXAMINATION

BY MR. SEGAL:

Q Mr. Davis, are you currently employed at Lukens Steel Company?

A Yes, I am.

Q In what position?

A Mechanic.

Q And when did you start at Lukens initially?
A June of 1959.
Q And what position did you start in?
A Laborer, General Laborer.

* * * *

[10-12] Q Mr. Davis, do you know a man by the name of Norman Diem?

A Yes, I do.

Q In 1968, were you involved in an incident with Norman Diem?

A Yes, I was.

Q Can you describe that incident for us, please?

A Yes. At that time I was working the Plant F Conditioning area, working with a Mr. Stollard for the company, doing some research and testing of new [10-13] equipment.

Q Mr. Stollard was an hourly employee?
A Salaried.
Q Salaried?
A Yes.
Q White or black?

A White. He was in charge of testing some new burners. We were having trouble at that time with our electrical system throughout the plant in the grinding areas.

So they were installing some new grinders produced by the Basch Grinding Company from Germany. They had to install a new three-cycle electrical system for this testing procedure.

The representative from the Basch Company and representatives from Lukens were in the area, and Mr. Diem brought a worker from the Condition Department to By-Products area to work with me. And we both had to conduct a 12-minute test with these new grinders to see if they will be acceptable and up to the company standards.

Q Was this other employee white or black?

A Black. Mr. Diem, I had never worked for him, didn't work for him, had no conversation with him or anything before that time.

[10-14] His work did a 12-minute work period first, and he did not keep the ohmmeter between 9 and 12 ohms as required. Mr. Stollard told me to keep a lot of pressure and keep the ohmmeter between 9 and 12 meters, which I did.

When the first Grinder got finished his 12-minute work period, Mr. Diem walked over to him and tapped him on the shoulder and cut off the grinder. Mr. Diem proceeded to grab him by the ear and pull him around off the box and kicked him in the rear several times, at which time the rest of the people in the area found that amusing and they laughed. I said nothing and did nothing. I just looked, and I just looked at Mr. Diem.

Q And this other Grinder was black?

A Yes, he was black. So after I had ground for 12 minutes, I felt a sharp pain in the back; and I jumped up off the grinding stool and turned around. And there was Mr. Diem. He had kicked me in the back.

Q If you would turn to Plaintiffs' Exhibit 952, the employee record card of Charles Norman Diem, it doesn't list any discipline given to Mr. Diem.

Do you know whether he was given any discipline for what he did to you and to this other man?

A No, nothing was ever said to my knowledge.

[10-15] MR. SEGAL: I would simply like to note for the record, Your Honor, on the last page of that exhibit there is a document titled "Employee Change of Status," apparently representing a salary increase for Mr. Diem.

And under reason, for conditioning, and detail it says: "Merit raise has been due and outstanding job." The signatures under approvals are: W.J. Metcalf, I think, N.J. Thompson, and the last signature is J. Louis Irwin.

THE COURT: Did you bring that kick to anybody's attention? Did you complain?

THE WITNESS: Yes. I told Mr. Brown about it, our Union Representative.

BY MR. SEGAL:

Q And what did he do?

A He said, "Forget about it because Mr. Diem apologized." The German representative of the Basch Company couldn't speak English, and through an interpreter he asked me if I was hurt. And I said I was all right. He preceded to walk out of the plant. He apologized and brought him back. He pulled my shirt up and looked at my back and asked through an interpreter why did this man kick me and was I hurt. I told him I was all right, and Mr. Diem apologized. And that was [10-16] supposed to be the end of it.

Q He apologized with this German man there?

A Yes.

MR. SEGAL: No further questions, Your Honor.

CROSS-EXAMINATION

BY MR. KLUGHEIT:

Q Mr. Davis, do you recall the date of this incident that you described involving Mr. Diem?

A No, not offhand I don't.

THE COURT: Approximately? Can you give us an approximate time? Sometime longer than last week I assume. Give us your best estimate.

THE WITNESS: It was around—in the '60s.

BY MR KLUGHEIT:

Q Let me direct your attention to the last page of P-952, which is the increase from Mr. Diem that your counsel just read into the record. That increase indicates it is dated effective 6/5/66.

Does that mean, therefore, that incident with Mr. Diem would have been before 1966?

A In all probability it was around that time because we were testing the new grinders about that time, I believe.

* * * *

[10-43] LEON WHITFIELD, sworn.

DIRECT EXAMINATION

BY MS. GARTRELL:

Q Mr. Whitfield, are you presently employed at Lukens Steel Company?

A Yes, I am.

Q What is your job?

A Crane operator.

Q How long have you been employed at Lukens?

A Fifteens years.

Q Since 1965?

A Yes.

[10-44] Q Are you presently serving on the Negotiating Committee of Local 1165?

A I am.

Q Have you previously held other positions with Local 1165?

A Yes, in the position of shop steward and grievance assistant committeeman and committeeman.

Q You were elected to the position of assistant committeeman in the spring of 1979; is that correct?

A Yes, I was.

Q Are you presently serving in that capacity?

A No, I am not.

Q Did you resign the position?

A No, I didn't.

Q Why are you not serving in that capacity at this point?

MR. SILBERMAN: Your Honor, may I renew the objection Ms. Clark made with respect to this same testimony of Mr. Davis?

THE COURT: Yes. You have continuing objection.
MR. SILBERMAN: Thank you.

BY MS. GARTRELL:

Q Why are you not presently serving in the position to which you were elected in the spring of 1979?
[10-45] A That position was taken from me.
Q By whom?
A As I can understand it, by the International District 7 and the parent body of 1165, as much as I can understand it.

* * * *

[10-71] Q Now, if you will, look at Plaintiffs' 932. This is a collection of documents dated from 1977. I will ask you to identify these various documents in the exhibit.
[10-72] First is a letter which is over a typewritten name, Leon Whitfield. There is no signature on this letter. It is dated August 18, 1977, and addressed "To Whom It May Concern."
Who did you send this letter to and why did you send it?
A I sent the letter to the Vice-President of the United Steel Workers of America, Maloney I think was his name, at the time. And the letter was self-explanatory. I am frustrated and disgusted, and I wanted to find out what can be done about the way things are being run at Lukens.
Q Was this letter returned to you or—this is a copy of a copy?
A Yes.
Q I have the signed version. Was the letter that you sent to Mr. Maloney returned to you?
MR. SILBERMAN: Your Honor, I object to all testimony about this incident. There is no possible bearing on this case.
THE COURT: The objection is noted, and I can't tell until I hear it. I will reserve ruling.

BY MS. GARTRELL:

Q Was this letter returned to you?

A Yes, it was.

[10-73] Q And is the second page of this exhibit a note by you to Mr. Lynch after you received the first letter back in the mail?

A Yes, it is.

Q This bears a stamp at the top "October 6, 1977, Pittsburgh, Pa."

As far as you know, is that stamp from the Union Office in Pittsburgh?

A Yes; I am more than sure it is.

Q Who is Leon Lynch?

A He is the Vice-President of Human Affairs.

Q Is he still Vice-President of Human Affairs or do you know?

A I think he has moved up. I am not sure.

Q Did you receive a response from Leon Lynch?

A Yes, I did.

Q Is the next page in the exhibit that response, a letter dated October 6, '77?

A Yes, it is.

Q Who is Mr. McGeehan, he appears to have gotten a copy of this letter?

A He is the District Director of District 7.

Q Now, did you receive from Mr. McGeehan in a response to your letter?

A No.

[10-74] Q All right, if you will turn past what appears to be a steel workers memorandum—and go to the October 13, '77, letter signed by Frank Mont—did you receive this letter?

A Yes, I did.

Q This is addressed to you?

A Yes, it is.

Q You had a new address at this time?

A Yes, that is correct.

Q Did you inform Lukens Steel Company you had a new address?

A Yes, I did.

Q Who is Frank Mont?

A He was the representative from District 7. I don't know the position that he held. That is the only thing that I did know about him.

Q His letter indicates that he had considerable trouble reaching you by telephone or by letter. And did you have any discussion with Mr. Mont about his claimed inability to reach you?

A Yes, I did.

Q When did you have that discussion, before or after you got this letter?

A Before.

Q And was that by telephone?

[10-75] A Yes. He called my house, and he told me that he was having difficulty getting in touch with me.

Q And what did you say to him?

A I told him how big a liar he was. He hadn't really tried, because if he had—someone was always at my house. If he had called—

THE COURT: Which of those two numbers would have been the right one?

THE WITNESS: 227-5017. The other number was the number I was working at the mill. That was left to him, an emergency at the mill. I wanted him to see at the time—

THE COURT: Okay.

BY MS. GARTRELL:

Q What else happened during this discussion with Mr. Mont on the telephone? Was there anything else said?

A Well, he told me—he asked me just about what it was I wanted to talk about. I was telling him that I wanted to talk about how ineffective our Union was at Lukens and that I could give him enough people for

witnesses to testify to the fact that we are not getting the representation that we should be getting and especially the blacks.

And I told him that these are things that our president, vice-president and chairman of the Grievance Committee will not meet with us so we can talk them out.

And I told him that—he in turn told me that we would have the meeting at the Suburban Building here in Philadelphia whereas he would get in touch with everybody in 1165 where they would be on neutral ground where all our differences could be ironed out.

And then I got this letter—

Q You got which letter?

A This is one here, October 13th.

Q Now, the next letter in this exhibit is October 21st, a letter from Frank Mont.

Did you get this letter?

A Yes, I did.

Q This says that a meeting was scheduled for October 28th in Malvern.

A Right.

Q And Mr. Mont come back to you since your first conversation and said he was going to change the location of the meeting?

A No, he didn't.

Q Was this meeting held?

A Yes, it was.

[10-77] Q Before I ask you about that meeting, the four people at the bottom of this document—I think Pilotti and Brown have been identified sufficiently—who is Bert Hough?

A That is a good question. I met him for the first time at that meeting.

THE COURT: It says a staff representative.

THE WITNESS: He wasn't for our local at that time unless he was a substitute because "Horsey"—I don't know "Horsey's" name.

BY MS. GARTRELL:

Q Is it Zitarelli?

A I think that is his name. He was our staff representative.

Q And McGeehan was Director of District 7?

A He wasn't there.

Q He is copied on this letter, though.

A Yes. He is on the letter, but he wasn't there.

Q All right, who was at the meeting?

A Well, then, Pilotti and James Brown, Bert Hough and Frank Mont and Jim Brewer.

Q Was Jim Brewer with you?

A Yes, he was.

Q He is black?

[10-78] A Yes, he is.

Q Were there any other black employees who had planned to attend that meeting but did not attend?

A Yes. Dave Brown was supposed to attend and Leroy Davis, Jr. was supposed to attend. We had two or three mornings—beginning to clutter—but we had two or three more.

Q All right, what happened at that meeting?

A Well, nothing. We were pacified. At the meeting we talked over our grievance. Frank Mont came in with the wrong attitude. He came in already with a biased attitude. He walked saying if this had anything to do with racial discrimination he wasn't going to hear it.

He hadn't heard nothing. He just met me, and this was his response.

Q Were those his first words to you?

A Instead of "hello," this is exactly how he addressed himself.

Q And what was your response to him?

A That the only thing we wanted was an audience and let him decide what we were trying to get out.

Q And then did you and Mr. Brewer put certain things in front of Mr. Mont as things which were happening that you were concerned about at Lukens?

A Yes.

[10-79] Q What did you say that you were concerned about?

A I was concerned about job consolidation. I was concerned about how the Union is not representing all the people.

The Union's function is to secure jobs or if you do have a job to see it is secure. It is supposed to be insurance against things that do happen to us, and that is not what we have up there.

* * * *

[10-84] Q Continuing with this super laborer problem, Mr. Whitfield, first of all, did you express concern about the super laborer job consolidation at the meeting with [10-85] Frank Mont on October 28, 1977?

A Yes, in parts; but he wasn't the type that could sit still nor could I paint a clear enough picture for him to see what was happening.

Q Did you express to Mont the concern the super laborer change discriminated against blacks?

A Not in that sense because I was trying to be evasive because he told me if it was racial discrimination oriented that he would walk out.

So I was showing him whereas this would set a precedent, that the Union could ill afford, because it was jumping every seniority barrier. It was jumping subdivision lines and seniority barriers.

Q Did you avoid using the term "racial discrimination" in order to have the meeting continued?

A Yes.

* * * *

[10-87] Q All right, back to the October 28th meeting with Frank Mont, were there other concerns that you expressed to Mr. Mont at that meeting?

A Yes. It came from Jim Brewer; but him as a truck driver, his driving truck for the Labor Department in Job Class 8, he said that he told the Union—and he

mentioned Pilotti and "Yi" Brown—that he had complaints against the riggers and other departments using trucks in the same way that he did. He picked up passengers and deposited passengers, and they were doing the same thing only they were getting Job Class 16 and so forth. And he said that wasn't fair.

Q Were there truck driving positions in other subdivisions than in the Motor Truck Subdivision?

A Yes.

Q What was Mr. Mont's response to Mr. Brewer's comments?

A He didn't have any response. His was more, like I said at the outset, pacification. He just told us the things he was doing, when he was coming up, and the things to look at for; but he didn't actually give any decisions of any sorts.

Q Do you remember anything else that happened at [10-88] this meeting?

A Nothing except we were told—he told [Benny] that it would be wise to listen to us if we have any gripes, to make himself available. And he told me that if we did have anymore gripes of this sort and we just wanted to get them off our chest, feel free to call him. Like I say, he was pacifying us.

Q That is what you meant by "pacification"?

A Yes.

Q What did all this have to do in the meeting with race discrimination at Lukens?

A Everything that happens at Lukens to me pertains to race.

Q How did the particular things you were complaining about pertain to race?

A All right, I will put it this way: I have complained primarily about them putting truck washing in the truck driver subdivision.

Q This is something else you raised at the meeting?

A This was my prime concern because it pertained to me, and I was driving truck in Job Class 8 and con-

stantly when I am in the crane I am in Job Class 8. When I signed up for the Transportation Department, truck driving didn't have truck washing in the subdivision.

[10-89] So as a result, they in turn—the Union and the Company got together and they decided they would put truck washing in our job description with no prior notice. We were to work one day and Tom Franklin, the superintendent of the department, came into our safety meeting and said he is doing us a favor, he is putting truck washing in our subdivision, a Job Class 5.

Now, I am a troublemaker to the company if you let them tell it; and he looked right at me when he said Job Class 5. And I said to him, I said: "Now that will cause me to have to take a pay cut with the seniority language because I am low man on the totem pole." So he said: "Well, don't give it any thought," he said, "because that will be Job Class 5 plus 12," which is incentive.

Well, I told him: "That would be the equivalent of Job Class 8." I told: "If that is so, we won't have no squabble. Make it all Job Class 8 and we won't have any argument." So nothing came out of that.

When I went to Benny and "Yi" about that and I told Gerald Johnson, he said he would look into it.

Q He was a union committeeman?

[10-90] A He was assistant to "Yi." He said he would look into it. Benny and "Yi" stuck their chest out that this was a move that they had made for the truck drivers, in case they were out on the town getting drunk and lose their license so they would have a job.

Q Was this the reason for the change that Benny and "Yi" gave you?

A That was their reason, yes.

Q Was that the reason Tom Franklin gave you for the change?

A He was patting himself on the back, he was doing us a favor.

Q Had it ever happened that you got drunk on the weekend, lose your license, and got—

A I never lost my license in any event.

Q You discussed this at the October 28th meeting?

A Yes, I did.

Q Did Mr. Mont have any response to this?

A None.

Q All right, now how did that job change discriminate against you on the basis of race?

A Well, I was exempted from having to wash trucks if I had stayed in transportation.

* * * *

[10-92] Q You said they obtained some kind of special exemption for you in particular with respect to this job change?

A Yes, they did.

Q Did you take advantage of that?

A No, I didn't.

Q What did you do?

A Got out of the department.

Q Went back to cranes?

A Yes, I did.

Q Where you are today?

A Yes, I am.

* * * *

[10-93] Q Next in this document is a letter dated December 1, 1977, from Leon Lynch to James McGeehan concerning a letter—

MR. SILBERMAN: Before we go forward, I renew my motion to strike now that we have covered everything at that meeting.

THE COURT: Motion denied.

BY MS. GARTRELL:

Q This refers to a letter you had written on November 30. We did not have a copy of that letter. Did you write such a letter on November 30th?

A Yes, I did.

Q Who did you write that to?

A I wrote that directly to Leon Lynch.

Q And what did you say in that letter?

A I was telling him that I don't feel that we were properly represented at that last meeting with Frank Mont, and I requested an audience with him. And this time I was going to give him everybody that would hear me, to have a mass meeting with him hearing all our gripes.

This time I told him in that letter that I would circulate through the Mill with petitions to have them signed to impeach Mr. Pilotti and "Yi" Brown, and I had an accident that next week.

[10-94] Q Was a meeting scheduled to be held?

A I never did get no more correspondence from Leon Lynch.

Q You had an automobile accident the following week?

A Yes, I did, December 9th.

Q How long were you out of work?

A Forty-five days.

Q So the meeting was never held?

A No, it wasn't.

Q Were you asking for a mass meeting at Lukens?

A No. I asked all the fellows that worked around me that was around me that did see me would they meet with me if I did set up this meeting with Leon Lynch.

Q Did you express in any of your correspondence or at that meeting in October any concern about the grievance processing as it was occurring at Lukens?

A That had the top position. See, that is mainly how we are being discriminated against.

Q And how was that?

A We are not—the grievances aren't framed properly. If I were to go to my committeeman and tell him I was just discriminated against and whatever way that I am discriminated against, the word would never be framed in the grievance.

Q What word?

[10-95] A Discrimination. Discrimination spoken in Lukens is like taboo. It is just not used. Because it is not used, it can't be—we are not getting the benefit of what the Union should do for us because it is not framed properly.

THE COURT: The question is: Was that discussed at the October meeting?

THE WITNESS: Yes, it was.

THE COURT: Okay, what did the Union people say about it?

THE WITNESS: Nothing.

BY MS. GARTRELL:

Q Have you ever discussed that with Union officials from 1165 at any other time since that meeting?

A All the time.

Q And have you gotten any response?

A None.

* * * *

[10-96] Q Does a shop steward have the power or authority to file a grievance?

A No.

Q What is it that a shop steward does?

A Handle first and second step grievance procedures.

Q And are those meetings at the plant level with supervisors?

A Yes, the immediate people that is involved; that is, the worker and the turn foreman and what have you.

Q That is what happens at the first step?

A Yes and second step. If you don't get no "whatchacallit" I turn over to the assistant grievance committeeman or grievance committeeman.

Q If you don't get no satisfication; is that the "whatchacallit"?

A Yes.

Q You turn it over to the assistant committeeman or committeeman and he will file a grievance if one is to be filed?

A Yes. He can take it on from there.

Q Does he make the decision to file the grievance?

A If I don't get anywhere. It is a matter I can't go to the superintendent. That is not my function. He would have to take it from me, and I wouldn't be finished. I would just relinquish it and give it to him. [10-97] Q Does anybody beside the grievance committeeman and chairman of the Grievance Committee have the authority to file a grievance for an employee?

A The only ones that can do so is the ones who are in that particular Zone.

Q Well, first let's establish whether or not any other officers or officials of the Union have a right or power to file a grievance or is it just the committeeman?

A Well, no, assistant committeeman and committeemen can file grievances.

Q Are you saying even they can only file a grievance in the Zone they represent?

A That is what the grievance book says.

THE COURT: Can the shop steward have any input into how the grievance is written up?

THE WITNESS: Yes, he should.

THE COURT: If you wanted to present a grievance on the basis of racial discrimination and they were writing up a grievance and didn't use the word "discrimination," couldn't you insist the word "discrimination," be used?

THE WITNESS: Not at Lukens.

THE COURT: Why not?

THE WITNESS: You would be voted out. [10-98] They just wouldn't do it. They would just tell you it is out of your hands.

* * * *

[11.12] Q Is it also your claim then that the International removed you from your position because of your race?

MR. SILBERMAN: Objection, Your Honor. It is a leading question.

THE COURT: Objection overruled. It calls for a yes or no answer.

THE WITNESS: Yes.

BY MS. GARTRELL:

Q Other than what you've told us, is there anything further that you would base that belief on that claim?

A Yes. I would have to base it on the facts that by introduction to Frank Mont, his first words at that meeting to me was that he will not hear or sit in on any meeting if it was discriminatory, racially discriminatory, he said, and he also said that I am to be reminded that if I did have a meeting, I would have to understand that he were the personal friend of Benny's and Yi's.

I told him I would want the meeting under any circumstances.

THE COURT: Excuse me, I don't understand that.

He told you he wouldn't attend the meeting if it was racially discriminatory or he wouldn't attend if a charge of racial discrimination was to be [11.12A] discussed?

THE WITNESS: The charge of racial discrimination.

* * * *

[11.46] Q All right. Let's talk about the election in April of '79.

Now, first, to be eligible to run for a [11.47] committeeman, you have to work in the zone in which you are running?

A Yes.

* * * *

[11.57] Q Now, after you filed your protest to the Labor Department about this election, what happened?

A What happened after I protested?

Q To the Labor Department, yes.

A Oh, you're talking about the last letter that I wrote?

Q Yes.

A I'm just getting an answer back that they didn't find in my favor from the evidence that they had gotten that they had cropped up.

Q A representative of the Labor Department came out to the plant and spoke to you and to Leroy Davis, Jr.; is that correct?

A No, nobody spoke to me at the plant, no.

Q Spoke to you at the union hall?

A No.

Q Didn't speak to you at all?

A He spoke to me at my home.

[11.58] Q Okay.

A I don't know if he spoke to Leroy Davis or not, no.

Q But he did speak to you?

A Yes, he did.

Q And you received an answer from the Labor Department saying that they didn't find in your favor; is that correct?

A Yes, they did.

Q Take a look at Union 470 and just identify the document.

A It is not in alphabetical order.

Q It is not, I apologize.

Is this a statement of reasons you received? (Indicating.)

A Yes, it is.

Q And what the Labor Department found is that in fact you were working in Zone 9 at the time you were nominated?

A No; that is not what this letter states.

Q Okay. Now, the person who protested your election was Ben Elliott; is that correct?

A That I don't know.

Q You don't know the name of the protestor?

A No, I don't.

[11.59] Q You were at the meeting after the election?

A It is alleged it is Ben Elliott. I don't know it for a fact, no, I don't.

Q Is alleged it is Ben Elliott?

A Yes.

Q What is his race?

A Black.

* * * *

[11.65] Q Now, in July of '79, there was another special election at the local union, wasn't there?

A Yes.

Q You were a teller for that election; is that correct?

A Yes, I was.

Q And one of the posts that was up was the assistant committeeman from Zone 2, was it?

A It could have been. I don't know.

Q Do you recall that Harold Yost was a candidate in that election?

A Yes.

Q And the tellers found him eligible to run in that election?

A Yes. I think he run.

Q And the tellers found that he was the winner of that election; is that correct?

A I think so.

Q And after that Robert Coffey filed a protest of [11.66] that election, didn't he?

A That is a good question. I think he did. Yes, he did, yes.

Q Okay, and Robert Coffey contended that Harold Yost wasn't eligible because he wasn't working in the zone, didn't he?

A That much I don't know.

Q Well, you know that the International found Harold Yost not eligible, don't you?

A No, I did not know the outcome. I thought Harold Yost did win it. Harold Yost is something in the union now.

Q Take a look at Union 472 and let me ask you if you have seen that document posted on the board in the grievance office at the union? (Handing witness.)

A No, I didn't. I never seen this.

Q You never discussed with Harold Yost or Robert Coffey what the outcome was of the protest?

A No, I didn't.

Q Harold Yost is white; is that correct?

A Yes, he is, so is Coffey.

* * * *

[11.68] Q All right, let's talk about your correspondence with the International. Leon Lynch to whom you wrote, what is his race?

A Black.

Q And he is a vice president of the Steelworkers Union?

A No.

Q Do you know what his position is?

A I think he is vice president of the Human Affairs.

Q Frank Mont, what is his race?

A He is black.

* * * *

[11.69] Q After you wrote the letter that is the last page of that exhibit, what happened?

A I had an accident. Nothing.

[11.70] Q Did you ever hear from Frank Mont or Lynch?

A No.

Q You never got a letter from Frank Mont?

A Not after that, no.

Q Take a look at Union 463. Take a moment to read it if you want.

My question is: Did you receive that letter?

A This letter here? (Indicating.)

Q Yes.

A The last page of this is a different date on 9—

THE COURT: Exhibit 463.

THE WITNESS: This is the last letter. This is December 1st, 19—this is December 12th.

MR. SILBERMAN: That is right.

A Okay.

Q Did you receive that letter? If you want to take a moment to read it, go ahead.

(Pause.)

A No; I never received this letter.

Q. You never received it?

A Never.

Q Okay.

THE COURT: You were living at the address shown on the letter at that time?

[11.71] THE WITNESS: Yes, sir.

BY MR. SILBERMAN:

Q On page 2 of this letter, the top paragraph, Mr. Mont writes: "Before the meeting adjourned, I requested that certain allegations made by you and not explained to my satisfaction be investigated and you and I were to be made aware of the findings of such investigation."

Now, the allegations that Mr. Mont asked to have investigated concerned Donald Weldon failing a test on two occasions, didn't they?

A That was one of the allegations.

Q And wasn't that the one that he asked Yi Brown to investigate, to report back to you and to him on?

A Yes, yes.

Q And the reason he said he wanted that allegation investigated was because it was a civil rights matter and he was the Civil Rights coordinator; isn't that right?

A No. That wasn't established, no, it wasn't.

Q At the meeting, Mr. Mont told you that charges that didn't pertain to civil rights he couldn't handle because he wasn't the Civil Rights coordinator, didn't he?

A No, sir.

Q Didn't he tell you that you should go through [11.72] established procedures and explained what the procedures are?

A No, sir.

Q Now, you take a look at the second paragraph of that letter.

A Yes?

Q Which says: "I informed you and Brother Brewer of the procedure that has long been established in the district for bringing to the attention of the International union concerns and apprehensions of our members."

He didn't tell you about that at the meeting?

A He didn't tell me this, and I'm just seeing it for the first time.

Q Okay, you are sure you didn't receive a copy of this letter?

A Just as sure as I am alive.

Q All right, let me ask you to take a look at a document which you don't have, which I will bring to you, which is Defendants' Exhibit 464. (Handing witness.)

Now, that is another copy of the same letter, isn't it?

A Yes.

[11.73] Q And on the bottom of page 2, the signature there is your signature, isn't that it?

A Yes.

Q And the writing on that page is your writing, isn't it?

A You're absolutely right.

Q Now, you received a copy of that?

A I remember now.

Q And you sent a copy to the International Union?

A Yes, I did.

Q But it's still your testimony that Frank Mont didn't tell you anything about going through the procedures at that meeting?

A He didn't then and he didn't now and he still hasn't showed that yet.

Q At the meeting with Frank Mont, you told him that your charges didn't relate to black and white matters, didn't you?

A No. No, I did not tell him that. He said, if this was all discrimination, he would not hear it and I told him he would hear it—I would appreciate it if it be recorded, anyhow, that we did have a meeting.

Q Well, let me read your deposition excerpts and ask if you gave this testimony?

[11.74] This is page 425.

"Question: He said, if it was discriminatory——

"Answer: He wouldn't have anything to do with it if it was a black or white issue.

"Question: Did he say who would?

"Answer: No. I told him these charges I'm bringing don't have anything to do with black and white."

BY MR. SILBERMAN:

Q Did you give that testimony, Mr. Whitfield?

A Yes, I gave you that testimony and you went off the record when I explained to you because I wanted to get his attention.

Q Well, there's no indication on that page of any discussion off the record, is there?

A No, there's no indication.

Q Now, you discussed the charges you were making against Mr. Pilotti and Mr. Brown with both blacks and whites alike because you believe they pertained to both races, didn't you?

A No.

Q Well, let me ask you, if you gave the testimony that's shown on page 427 of your deposition, Mr. Whitfield? Let me start on page 426 to give context, [11.75] on line 17. You're in the middle of an answer. You said, "I told them if it takes an impeachment—are you willing, in case I wanted to get some petitions here, are you people going to back me up even if it means impeachment?

"Question: Who did you say that to?

"Answer: Everybody that I talked to. Leroy Davis. He was helping me——

"Question: Leroy Davis, Jr.?

"Answer: Yeah.

"Question: Did you say that to anybody else?

"Answer: Jim Brewer. He was with me. My point is, everybody. Everybody that I seen.

"Question: Do you recall specifically who you said that to?

"Answer: No.

"Question: Were you saying this to blacks and whites alike?

"Answer: Yeah. Because it pertained to everybody."

BY MR. SILBERMAN:

Q Did you give that testimony, Mr. Whitfield?

A Yes, I did.

Q All right. Now, one of the matters that you [11.76] discussed at the meeting with Frank Mont concerned moving the truck washing job into the truck driving subdivision; is that correct?

A Yes.

Q And what happened there was that the company decided it wanted to move this truck washing job, which had been a pool job, into the truck driving subdivision; is that correct?

A I don't know this.

Q You were told——

A I know that it was done.

Q You don't believe that that was done for racial reasons, do you?

A How do you mean that?

Q Do you believe that the reason the company did this was to discriminate against or disadvantage black employees?

A Well, the blacks is in the pool and if it's moved, the union—they do it without no question. It's done. It's moved into a unit.

Q I don't believe you answered my question.

Do you believe that the reason the company moved the truck washington job into the truck driving subdivision——

A It's white motivated. No, I don't.

[11.77] Q Now, the person who told you that the reason this move was being made was to provide work for truck drivers if they lose their license or they get drunk—that was Tom Franklin, correct?

A Yes.

Q And he's the superintendent of the department?

A Yes.

Q And he said this at a meeting of all the truck drivers, a weekly safety meeting, correct?

A Correct.

Q Now, the union filed a grievance about the move of the truck washer into the truck driving department, didn't it?

A No.

Q Well, the union negotiated an agreement, which provided that all incumbents in the truck driving subdivision wouldn't have to take the truck washing job, didn't it?

A No.

Q Take a look at Defendants' 372, Mr. Whitfield.

Did you ever see that agreement before?

A No.

Q Was it posted in the department?

A No, not while I was there, no.

Q You were a shop steward, correct?

[11.78] A Yes.

Q And Gerald Johnson, he was in the area at the time?

A Yes, he was.

Q He was assistant committeeman?

A Yes, he was.

Q He was a friend of yours?

A Yes.

Q He never showed you this agreement——

A I was out of the department because the truck washing was put into the department, into the subdivision and I left the department as a result—because the union had already okayed it without a prior meeting. It came to us as a shock, and when Tom Franklin spoke to us, it was already in effect.

Q Now, at the bottom of that agreement, it says, it is also agreed that any grievances relating to above subject are closed and settled without any monetary liability on the company's part.

Does that refresh your recollection as to whether any grievances were filed about moving the truck washing job into the truck driving subdivision?

A No, it doesn't.

[11.79] Q As far as you know, there weren't any?

A That's what I said.

Q Now, you testified last time that this truck washer incident was your prime concern at the time you met with Frank Mont. Do you recall that?

A Yes.

Q But at the time that you met with Frank Mont, you [had] been out of the truck driving subdivision for a year, hadn't you?

A I don't think so. I was out a considerable time and I remember now, I had sent letters and I didn't get an audience until so much time later.

Q Well, take a look at your seniority service card, which is the first of the Plaintiff-Whitfield exhibits.

Your employee record card will do. That shows that you went——

A March of '76.

Q That shows that you went to crane operator for the time in March of '76; is that correct?

A That's correct.

Q And you wrote your first letter in August of '77; is that correct?

A That's correct.

* * * *

[11.124] WILLIAM J. WHITEMAN, sworn.

DIRECT EXAMINATION

* * * *

[Q] By whom are you presently employed, Mr. Whiteman?

A Lukens Steel Company.

Q And you have worked as an assistant and a staff representative in the labor relations office since 1971?

[11.126] Q Now, during the period from 1951 when you became a night clerk in the employment department up through 1971, were you involved in hourly hiring and transfer in the employment department?

[11.127] A I didn't start to do any hiring or interviewing until 1952.

Q Okay, from that point——

A Wait a minute, I'm sorry, 1954.

Q So it is 1954 when you were involved with hourly hiring and transfer in the employment department?

A Yes.

* * * *

[11.137] Q Am I correct that the determination of an employee's eligibility for transfer was made on the basis

of his attendance record, disciplinary record and test scores?

A Yes.

Q And over the course of years that you were involved in hourly hiring and transfer, is it correct [11.138] that the emphasis changed such, that that discipline and attendance records became less important, while test scores became more important?

A Test scores did become more important.

* * * *

[11.143] Q Mr. Whiteman, during your tenure in the employment department, the Wonderlic test was used to determine eligibility for transfer, wasn't it?

A Yes.

Q And you don't know, do you, if the Wonderlic was used or not after you left the employment department in 1971?

A No; I don't know that it was used.

Q Pardon me?

A I don't know.

THE COURT: It will be helpful if you could keep your voice up. Everybody in the courtroom [11.144] was dying to hear your every word. The last few words were escaping us. Talking into the microphone.

BY MR. BORISH:

Q Was the Wonderlic still being given at the time you left the employment department?

A No.

Q So your testimony is you know it had stopped at that point?

A At the time I left, yes.

Q Would you take a look at Plaintiffs' Exhibit 38, please.

(Pause.)

A I assume you are talking about the last sentence of the first paragraph.

MR. BORISH: Well, I would like Mr. Whiteman to read it. I showed him this document at a deposition, and there is some deposition testimony that relates to it.

THE WITNESS: All right.

BY MR. BORISH:

Q Do you remember at page 68 of your deposition I showed you this document and I asked you: "From looking at the document, does this refresh your recollection at all, anything in the document refresh your recollection as to whether the Wonderlic would still be used as of [11.145] the date of the document?"

Your answer was: "I don't know whether it was used or not after that point."

A Well, I think I just answered that in the same context. I don't know whether it was used after that.

Q I see.

THE COURT: It was being used at the moment you left, and you weren't sure whether it might have been used thereafter.

THE WITNESS: True, yes.

MR. BORISH: Okay.

BY MR. BORISH:

Q While it was being used, there were certain cutoff scores, weren't there, on the Wonderlic which employees were required to have in order to gain entry into various jobs and subdivisions at Lukens?

A Yes.

Q And in fact from 1956 until whenever the Wonderlic ceased to be used until you left the employment department were you responsible for telling your subordinates what those cutoff scores were to be?

A Yes.

Q Now, when Mr. Harry Morton was your boss, was he the person who determined the cutoff scores?

A At that time, yes.

[11.146] Q And later on when Mr. Domangue became your boss, did he determine the cutoff scores?

A Yes.

Q Thereafter when Jim Hall became employment manager he didn't make any changes in the cutoff scores, did he?

A Not that I'm aware of, Mr. Borish.

Q There was also another test known as the SRA Mechanical Test, which was given during your years in the employment department, wasn't it?

A Yes.

Q And was that test given to all applicants for trade and craft jobs and apprenticeships?

A Yes.

Q That was given at least from 1956 until you left the employment department, wasn't it?

A I don't know when it stopped. I have no idea when it was stopped.

Q Was it given as of the time you left the employment department?

A Not that I'm aware of, no.

Q Page 93 of your deposition I asked you: "With respect to trades and crafts you said that in 1956 the SRA Mechanical Test was given to all applicants who transferred to trades and crafts?"

[11.147] Your answer was, "Yes."

A Yes.

Q Then I said: "Now, did that continue up until the time that you left the employment department?"

You said, "Yes."

Does that refresh your recollection?

A All right, I stand corrected.

Q Now, that test was a written test, wasn't it?

A How do you mean written, Mr. Borish?

Q In words.

A There were words.

Q You have to read and have to write to answer the test?

A Yes.

Q Was the same cutoff score on that test required for admission to all trade and craft jobs and apprenticeships? Was there one single score required?

A For apprenticeship?

Q For all trade and craft jobs and apprenticeships; was there one single cutoff score that applied?

A I really can't remember. If you have it——

Q Let me take a look at your deposition. Page 93 I asked you:

"Question: Was there a cutoff score on the SRA Mechanical for admission to trades and crafts and [11.148] apprenticeship?"

And you said, "Yes."

Then on page 94 I asked: "Did that cutoff score apply to all trades and crafts? Was there one cutoff score for all trades and crafts and apprentice or were there different cutoff scores for different trades?"

Your answer was: "The same score applies in all cases."

Does that refresh your recollection that there was one cutoff score?

A One cutoff score.

Q And that score remained the same single absolute cutoff score until the time at least you left the employment department; isn't that right?

A Yes.

Q There was another test known as the SRA non-verbal which was also administered by the employment department, wasn't there?

A Yes.

Q And that test was used by translating the non-verbal score into a Wonderlic score, wasn't it?

A True.

Q And you had a correlation table to make those translations of SRA non-verbal into Wonderlic scores?

[11.149] A Yes.

Q That test, the SRA non-verbal, was given very rarely, wasn't it?

A Yes, it was.

Q Back in 1956 am I correct that as best you can recall it was given only five to ten times a year?

A I think I testified to that before, yes.

Q Yes, you did. And am I also correct that up until the time that you left the employment department from 1956 on the use of that test decreased in frequency?

A Will you repeat that?

Q Am I correct that between 1956 and 1971 when you left the employment department the use of the SRA non-verbal decreased in frequency?

A Yes.

* * * *

[11.173] NORRIS DOMANGUE, sworn.

DIRECT EXAMINATION

* * * *

Q Are you presently employed by Lukens Steel Company?

A Yes.

Q And am I correct that you first joined Lukens in 1957?

* * * *

[11.174] A Yes.

Q And at that time you were the assistant employment manager?

A Yes.

Q Did you become employment manager in 1959?

A Yes.

Q And then in about 1966 or '67 were you named to the position of Manager of Personnel Administration?

A Yes.

Q And that is your present position now?

A Yes.

Q As Manager of Personnel Administration, what do you oversee? What functions of the company do you oversee?

A The Employment Department, the EEOC, the safety and plant protection and development and training.

Q EEOC is Equal Employment Opportunities?

A Yes.

* * * *

[11.183] Q Now you are aware, aren't you, that in the mid-1970s a black foreman at Lukens had the letters "KKK" marked on his workpapers?

A Yes.

Q Are you aware his name on his hard hat was crossed out and the words, "Uncle Remus" written in?

A Yes.

Q You're also aware, aren't you, within the last five or six years a burning cross was put in an area where blacks would normally go to change?

A Yes.

Q Mr. Demangue—

THE COURT: I would bet that last question is not strictly accurate. I doubt if a burning cross was put there. The cross may have been burned there.

MR. BORISH: Yes.

* * * *

[11.187] Q Now, Mr. Domangue, you've been involved in overseeing testing at Lukens since you've been an employment manager, haven't you?

A Yes.

Q Can you take a look at Plaintiffs' Exhibit-378? That's a copy of the Wonderlic test that was used at Lukens?

A Yes.

Q And that was used as a selection device through various hourly jobs?

A Yes.

Q Wasn't it also used as a selection device for filling foreman's vacancies?

A Yes.

Q Was the use of the Wonderlic test stopped at Lukens sometime after the 1971 Griggs vs. Duke Power, Supreme Court decision?

A I'm not sure of the exact stopping date, but I'm sure it was not stopped after the Griggs case.

Q Am I correct that the use of the Wonderlic was stopped at the same time at Lukens for all purposes, including its use as a promotion to foreman?

A I'm not sure about that.

[11.188] Q On page 93—92 and 93 of your deposition, I asked you, "Do you know when you stopped using the Wonderlic for promotion to foreman," and you answered, "Not by date. It would be after the Duke Power case."

I asked, "As best you can recall, did you stop using the Wonderlic for all purposes at that time, or did the use of the Wonderlic for promotion to foreman continue for some period after it was not used in other areas," and you answered, "No. We phased it out for all purposes," and I asked, "At the same time?" You answered, "Yeah."

Do you remember that?

A Yes.

Q Was that testimony accurate when you gave it?

A To the best of my knowledge, yes.

Q While the Wonderlic test was in use at Lukens, there were certain minimum scores which were required in order for people to be admitted to various jobs and subdivisions; isn't that right?

A Yes.

[11.189] Q Can you take a look at Plaintiffs' Exhibit 10, please, and if you would turn to the last two pages which have been stamped as 12 41 72 and 12 41 73,

do you recall how it was that those Wonderlic scores were chosen?

A No. My best recollection is that they were developed, not chosen, by using the national published norms and percolating in between skills.

Q Am I correct that those nationally published norms were put out by the test publisher, Mr. Wonderlic?

A Yes.

Q And was there a list of jobs that he put out and a suggestion of what the scores should be?

A Yes.

Q And he also reported, didn't he, that the test was only accurate, plus or minus two by the direction—

A Yes.

Q What did you do where there was no expressly comparable jobs in the nationally published material?

A The degree to which Lukens' jobs could be compared substantially with those categories that had national norms to them, we adopted those.

And others, we took estimates between what we would assume to be related skills.

* * * *

[11.190] Q You were looking at Plaintiffs' Exhibit P-10. Do you have that in front of you, again, the last two pages? Am I correct that where a particular job constituted a training for some higher job, the cutoff score on the Wonderlic for the higher job was also required for the lower job?

A Yes, in general.

Q Was there ever any study or investigation at Lukens to validate the use of any particular score on the Wonderlic, as a requirement for any particular job?

A We did some analysis by skills and the Wonderlic cutoff scores, but we became concerned about turnover in some of the areas and we wanted to see if it had some relationship. Those are not validations in the strict interpretation of the sense of analysis.

Q Well, can you tell me any specific study or investigation that was ever done at Lukens to validate the use of any particular score for any particular job and can you tell me the job

A Yes. Crane operators.

Q Other than crane operators, was there any study [11.191] or investigation ever done along those lines?

A Not that I can be specific about now. I can't think of any.

Q Was there ever any study of the Wonderlic at Lukens, which showed the Wonderlic to be a valid predictor of success on any Lukens' job?

A No.

Q But there were studies, weren't there, that showed that the Lukens—it showed that the Wonderlic was not a valid predictor of success for jobs at Lukens; were there not?

A There was a study that came to those conclusions, yes.

Q Well, there was more than one study, wasn't there, that came to those conclusions?

A No. I'm only aware of one.

Q Well, first, let's take a look at P-8, if you would. That's a letter from Mr. F. Clamb to Mr. Vanderveer?

A Yes.

Q Dated April 8th, 1952.

Can you read it and tell me if you have ever seen that before?

A No, I have not seen this letter before.

Q The record should note that there is an apparent [11.192] draft of that letter attached to Exhibit P-8, which states that the Wonderlic was one of the tests used in determining correlation results with the followup report—the followup report was a supervisory evaluation; was it not?

Q Can you turn to P-13, please?

A I might add that that letter—that correspondence

to which you're referring is before my employment at Lukens.

Q I understand.

P-13 is that crane operators' study about which you spoke earlier; is it not? Is that right?

A Yes.

Q And that study was done in 1964, wasn't it?

A Yes.

Q And turning to page 3, the intelligence test that is referred to is the Wonderlic, isn't it?

A Yes.

Q And you read this report back in 1964 when it was prepared, didn't you?

A Yes.

Q Now, let me direct your attention to the findings on pages—the bottom of page 3, over to page 4, which [11.193] states that there was no significant difference in the test results between the successful group of crane operator trainees and those who terminated, and it goes on to state that there was some indication of an inverse relationship, although the samples were too small to be reliable.

Did those findings have any broader implication for you beyond their relevance to crane operator trainees?

A No.

In specific instance of the crane tests, a tentative conclusion was that we will probably choose the overly qualified or overly intelligent people for a job that might be too confining, that came out of the reference of the inverse relationship.

There were other factors, obviously, that goes into a crane operator, but we would explore all of them.

[11.194] Q Did this study raise any question in your mind about the use of the Wonderlic for other hourly employees in the crane operators?

A No.

Q You knew back in 1964, '65, back in that time period, didn't you, that blacks were heavily concentrated in the lower job classes?

A Yes, there was an indication of that.

Q You also knew, didn't you, that the chief reason for this was the failure of black employees to meet the required scores on the Wonderlic test?

A The only test reflected educational facilities and other things.

Q I'm not sure I understand your answer.

Did you understand back in that time or did you know a chief reason for the concentration of black employees in the lower job classes, was their failure to make the required scores on the Wonderlic, to end up with higher job classes?

A One would say that, yes.

Q And in that time period, also, didn't you also know that th use of general intelligence tests like the Wonderlic, which had been developed on white, middle-class populations, penalized most black [11.195] employees?

A Not at that time, I didn't know that, no.

Q When did you first become aware of that?

A In and around the area of the Griggs-Duke Power case.

Q Not in 1971?

A No. I'm sure it was sometime prior to that when the general issue of testing and civil rights was being discussed nationally.

Q Weren't you aware of that back in 1967?

A I could have been.

Q Can you take a look at Plaintiffs' Exhibit-17? Does that refresh your recollection?

A Yes.

Q You were so aware back in 1967 then, weren't you?

A Yes.

Q Yet by 1968, hadn't the required Wonderlic scores for the job of pipefitter, rigger, painter, mechanical welder, mechanical repairman, bricklayer been raised two points higher than they were in 1963?

A I don't remember the incident, although we did discuss it during my deposition.

Q Why don't you take a look at Plaintiffs' Exhibits 25 and 26?

[11.196] These documents show required Wonderlic scores at Lukens for various jobs, don't they?

A Yes.

Q And take a look at the jobs on P-25, under the mechanical section.

And if you compare those scores to the scores on P-26 under the mechanical section, that is the first page on P-26—

A Yes.

THE COURT: It went up two points between 1963 and 1968, no doubt to account for inflationary trends.

BY MR. BORISH:

Q Mr. Domangue, even before 1968, you were—before 1968, were you worried about the validity of the test requirements for hourly jobs at Lukens?

A No.

Q You didn't want to shield those requirements from outside scrutiny, did you?

A No.

Q Well, didn't you urge your subordinates to steer grievances away from the testing area?

A I was more concerned about the abuse and misuse of testing and testing information that I was about [11.197] the validity of testing.

Q Let me ask you the question again, because I don't think I got an answer.

Didn't you urge your subordinates to steer grievances away from the testing area?

A I don't remember if I did or didn't.

Q Do you remember whether you urged subordinates to try to contain any arguments with opponents of testing to the validity of testing in general, as opposed to specific tests like the Wonderlic?

THE COURT: Other way around, I think, isn't it?
MR. BORISH: No.
THE COURT: What exhibit is it?
MR. BORISH: Take a look at Plaintiffs' Exhibit 19.

BY MR. BORISH:

Q First, if you look at the first page, does that refresh your recollection that you advised as to steer grievances away from the testing area?

A To keep unjustified criticism from testing, yes.

[11.198] Q And then over on the second page here see where you said, "We should stress where possible the validity of testing in the general area currently under criticism. We should try to avoid the specific involvements with specifically named tests, such as Wonderlic, et cetera."

A Yes. I think the document speaks for itself.

Q Is it still your testimony that at that time you were not informed about the validity of test requirements at Lukens for hourly jobs

A I'm not sure I understand the question. May I have it again?

Q At that point did you have any doubts about the tests that were used for hourly jobs in terms of the validity of those tests?

A I had doubts about misuse or abuse of them but not the principle of testing.

Q Well, did you have doubts about whether any of the specific tests that were being used were valid predictors of success on the jobs for which those tests were required?

A Not at that time.

Q Now, 1968 you learned, didn't you, that a study that had been done by two Lukens employees had shown Wonderlic to be an extremely poor predictor of later [11.199] job success measures, didn't you?

A Yes.

Q And those studies—that study is P-27, isn't it?

A Yes.

Q Mr. Copeland was Lukens test administrator at that time, wasn't he?

A Yes.

Q And he was there from 1968 to 1971?

A I'm not sure of the dates, but it is probably right.

Q Weren't you also advised in 1968 that Lukens was unable to support the Wonderlic as a valid placement and selection device for bargaining unit employees?

A That I was advised?

Q Yes. Did it appear that Lukens was unable to support the Wonderlic as a valid placement and selection device for hourly employees?

A Through that study, yes.

Q Let me ask you this: Were union representatives or the hourly work force in general made aware of the results of this study which is P-27?

A I don't know.

Q Did you have any desire to keep this study hidden or secret from the union or from the hourly work force in general?

[11.200] A Anything about which we are not sure until we have some firm conclusions on it we would probably keep under some discretion.

Q Did you want to keep from the union the advice that was given to you that appeared that Lukens was unable to support the Wonderlic as a valid placement and selection device for the hourly work force?

A The study that was conducted by two well-intentioned and reasonably qualified people but not as qualified as Wonderlic who had developed the test and which was used nationally.

There was a question in my mind as to whether this study compared authoritatively with the original studies.

Q Well, did you take a look to see how it compared after you got this study in 1968?

A No.

Q I am still not sure I got an answer to the question that I had asked, whether you wanted to keep the

results of this study secret from the hourly work force or the union?

A Not in the way it is phrased, no. We were not keeping it secret. We were not prepared to use it or publish it because we were not sure of its results.

Q Now, in 1971, did Mr. Copeland report to you, [11.201] do you recall, that there was a lack of sufficient evidence that intelligence was a relevant concept with respect to industrial job performance?

A I can't be specific about that, more specificness; but he had certainly reported something to that general nature, yes.

Q Take a look at P-39, if you would.

(Pause.)

You didn't agree with Mr. Copeland's assessment that there was a lack of sufficient evidence that intelligence was a relevant concept in industrial job performance, did you?

A No.

Q And in fact several months later didn't you decide that no tests that were then being used by Lukens would be abandoned until some superior substitute was found?

A I don't think it was that strong. I said that the concept of testing still had validity in my mind; that we should try to find as valid and as useful and acceptable testing as possible.

Q Take a look at P-41, please.

Does that refresh your recollection that in mid-1971 you decided that no current tests would be abandoned until a superior substitute was [11.202] developed, validated and instituted?

A Yes.

Q And was your decision followed?

A Yes. I can't explain the timing of it, but that is when we sought outside professional help to help us validate. We pursued it aggressively and as professionally as we knew how.

* * * *

[12.8] JAMES A. HALL, sworn.

DIRECT EXAMINATION

BY MR. BORISH:

Q Mr. Hall, I'll be asking you to refer to the documents in those two notebooks during your testimony.

Are you presently employed by Lukens Steel Company?

A I am.

Q What's your present position?

A Personnel Employment and Development Manager.

Q When did you start at Lukens?

A 1964.

Q And was your first position as an Assistant Employment Manager?

A That's correct.

Q And in 1966, were you promoted to employment supervisor?

A Yes.

Q And that point, you were in charge of the Employment Department?

A Right.

[12.9] Q What has the Employment Department overseen during the period that you've been in charge of it? What functions has it taken care of at Lukens?

A It's primary purpose is to recruit people from the outside, as well as to handle internal placements.

Q And has the office also overseen the company's equal employment opportunity efforts?

A Yes, it has.

Q Your present position as employment and development and training manager puts you in charge of the development and training office at Lukens, as well?

A Yes.

Q And that's a separate department from the Employment Department?

A That's correct.

Q And you achieved that position in 1973, did you?

A Yes.

* * * *

[12.20] Q You are also aware, are you not, that within the last two to three years several employees were [12.21] observed in the plant wearing arm bands that said, "KKK" on them?

A I have a vague recollection of that. I did not handle that incident.

Q You heard about it?

A I heard about it.

* * * *

[12.66] Q Let's put it into time context. Go back to P-[2]7, which was the 1968 study Mr. Copeland and Mr. Gary did on the Wonderlic.

A Yes.

[12.67] Q Now, do you remember that the criteria they chose to validate or invalidate the Wonderlic on were chosen because they were thought to be indicative of job success?

A They were; but when the study was set up, when the methodology of the study was set up, we knew at the outset the study was flawed. And it would be flawed from a statistical point of view.

The whole purpose of what we were trying to do was to get as quick an indication as to whether the Wonderlic appeared to be doing what we really thought it was doing.

Q Was it?

A Another conclusion was that it appeared it was not. However, I think one of the suggestions was that we should go further with a more detailed statistically pure study of that.

Q You continued at that point to use the Wonderlic as a cutoff requirement for entry into hourly jobs at Lukens, not to be hired or not the ones who were hired

to get into a job weren't there still different cutoff scores that were applied?

A We used the Wonderlic but in a much altered way following that.

Q You altered it for transfer purposes as well?

[12.68] A We lowered the cut scores is my recollection, the overall cut scores. We initiated—my recollection is a much more intensive use of the SRA; and in this same general time period—and I am not sure of my dates here—we lowered the cut score for hire at least three different times.

So the whole way we used the Wonderlic had changed. It was being used more as, let me say, an initial low-end screen in terms of reading ability.

Q Is there any written document that shows changes in the Wonderlic cutoff scores required for admission to trade and craft jobs?

A For trade and craft?

Q Yes.

A There was an earlier, I guess, reference yesterday to the fact that the Wonderlic had been raised. I think it was two points. I believe that it was in 1968.

That was a direct result of a negotiation where the trade and craft job classes had been raised. The purpose of raising the Wonderlic at that point for just those specific jobs was in order to remain consistent with the way we were applying the Wonderlic. That was the only time in my recollection we have ever raised the Wonderlic in that time period.

[12.69] Q Are you saying you applied the Wonderlic —you needed the same Wonderlic score as a job class of the job for which the person was applying?

A Come again?

Q You said you raised it two points because the job class was raised two points.

A Yes, that is correct.

Q Did you ever determine there was a correlation or relation between job class level and the points necessary on the Wonderlic score—

A Oh, yes.

Q —to operate successfully in that job?

A That was the whole basis of the Wonderlic, Mr. Borish.

Q Did you ever have any study at Lukens which showed you that?

(Pause.)

A Well, let's see, this goes back to what we were just talking about a moment ago, the 1969 study which —and I think I mentioned at the deposition that I had recalled—at least I felt I had recalled shortly after coming on board with Lukens having seen part of a similar study.

The bottom line of that study, if you can use that term, was to set the base for [12.70] Wonderlic, in fact measuring to some degree the mental effort required in the hierarchy of job classes.

It was all correlated with the Wonderlic normative data that he published. He had a great deal of normative data that dealt with Wonderlic scores for various occupations.

All of that dovetails together. So I think the way to answer you question is that the Wonderlic score was equated with job class ranks.

Q Are there written documents that show that there are studies at Lukens equating the Wonderlic score with job classes? Do you remember any written document at Lukens that showed that as the Wonderlic score rose that was able to predict better success on any job at Lukens?

(Pause.)

A Not specifically, not the way you explain it, no.

But the base of the original intent of the Wonderlic—and I have not been able to lay my hands on that—but it was all based on jobs at Lukens and what will be

required on the Wonderlic in comparison with the normative data published by Wonderlic.

Q Let me ask you: Was more mental effort required [12.71] for the trade and craft jobs after they were raised to job class levels?

A I don't recall that, Mr. Borish. I don't recall what factors went up when they raised the job class.

Q You are aware, aren't you, that this 1968 study that was done showed extremely poor predictability on the part of the Wonderlic in measuring later job success. Weren't you aware of that?

A Yes. I also told you we knew the study was flawed. It did not prove that. It was an indication of that.

Q You knew that before the study was done?

A We knew that when we were setting up the methodology of the study.

Q Did the study raise any question in your mind about the usefulness of the Wonderlic as a requirement for holding hourly jobs at Lukens?

A It did.

Q Indeed, didn't you conclude that it appeared that because of this study, after reviewing this study, you were unable to support the Wonderlic as a valid placement and selection device for hourly employees?

A That was Mr. Copeland's conclusion, I believe, in a study but only one conclusion.

[12.72] Q Did you agree with that conclusion that it appeared you were unable to support the Wonderlic as a valid placement and selection device for hourly employees?

A I agree; and, as you know, I later issued the directive to cease using it.

But one of the other conclusions was that further research was required and we should perhaps go through an empirical study, further research on the Wonderlic. We later concluded that was just not worth the effort.

Q And you didn't do it?

A No, sir, we did not.

Q It took you three years to reach that conclusion, more than three years?

A Well, as I mentioned a few minutes ago, upon the completion of Mr. Copeland's report we started using the Wonderlic in a significantly different way.

So we acted on the results. Then later we stopped using the Wonderlic scores for any selection purposes. We kept on administering the Wonderlic test purely to collect the test scores with the thought of then going through this empirical study. But we gave that up.

* * * *

[12.88] Q Mr. Hall, in 1973, Lukens started to use a test known as the Shop Math Test; did it not?

A 1973?

Q Yes.

A Yes.

Q And that test was first used for entry into the electric helper?

A Yes.

Q Who is Mr. Robert Kenna?

A In 1973, he worked for Lukens. In '73, I believe I'm correct—I think he was down in development training.

[12.89] Q He was a training coordinator, wasn't he?

A He was at one time. I'm not certain about the date.

Q Did you consider him to be competent in the field of testing?

A No. He worked under direction.

Q I see.

Did you solicit his advice with respect to the shop math test?

A I don't recall that.

Q Well, take a look at Plaintiffs' Exhibit 43, if you would.

You said he worked under direction.

Do you remember whether somebody directed him to give you his thoughts about this test, or whether he just happened to offer them?

A No. I'm sure he just didn't offer them at this point in time.

Well, above development training, he did have a responsibility in the apprenticeship training.

I think now in looking at this, that that's probably the connection in which the test was given to him, to critique of his knowledge of what apprentices had to learn.

Q I see that test—that shop math test at some point became a requirement into entry for all or just [12.90] about all of the Lukens trade craft jobs, didn't it?

A Into the—following 1973, yes, it was refined and extended to the trade craft areas, in which we were doing any staffing.

Now, we weren't staffing all of them.

* * * *

[12.112] RAMON LEE MIDDLETON, sworn.

* * * *

[12.133] Q Did you file any grievance over the fact that you weren't placed where you thought you ought to be placed on the roster?

A No.

[12.134] Q Why not?

A The union—they weren't accepting any grievances on the strand cast job because there had been an agreement between the company and the union and I think that agreement consists of 180 days that there would be no grievances filed.

* * * *

[12.135] Q Now, in this set of documents, you name not only the company, but the union as a defendant or respondent.

Why is it that you named the union as a respondent?

A Well, during this time I had met with various union officials at the union hall and to no avail.

So one particular day I was over there and our staff man, "Horsey," was there and we had a heated argument and he shoved his finger into my face and told me that I should be satisfied that I have a job at Lukens Steel and to accept what I had.

[12.152] Q Mr. Middleton, the time of all the controversy [12.153] over the strand cast manning, your committeeman was Carl Cannon, wasn't he?

A I think so.

Q And you've described him as a particular friend or a real good friend?

A An associate.

Q You disagree with the terms of a particular friend?

A No. I can use either one at various times.

Q You agree that he's a real good friend of yours?

A At times.

Q You've also described him as a very good committeeman, haven't you?

A Yes.

Q And you said that you respected him to the utmost as a man and as a union man, haven't you?

A Right.

Q Throughout all this controversy, you were in regular contact with Mr. Cannon about this problem?

A Right.

* * * *

[12.169] Q Now, on the question of whether you could file a grievance in order to get in, you said that you understood there was an agreement that no grievance could be filed for 180 days after the start-up of strand cast. You never saw such an agreement, did you?

A No, I didn't.

Q You understood that that had been signed by Michael Reach?

A Yes.

[12.170] Q And you also understood that it applied to everyone in the union and to the local union as an organization; as well?

A Yes.

Q And that, of course, means black and white people alike?

A Yes.

* * * *

[12.174] Q Now, you described a conversation with "Horsey" Zitarelli about this—"Horsey" is a staff representative; is that right?

A Right.

Q He was at that time?

A Right.

Q And you said that Mr. Zitarelli shook his finger at you and he said you should be glad——

THE COURT: We all heard that and this shouldn't be cross-examination. This is repetition.

What's your question?

BY MISS CLARK:

Q Mr. Middleton, you recall testifying at your deposition about that conversation with Mr. Zitarelli?

A Yes.

Q Do you recall saying in that deposition that your [12.175] conversation with him was that you couldn't grieve, because of the agreement that no grievances would be filed for a hundred and eighty days?

A Right.

Q And do you recall that what he said was that you didn't have a chance with this argument, so you might as well forget it?

A Something of that nature.

Q And you didn't tell me anything about him saying that you should be satisfied you have a job with Lukens, did you?

A I don't recall.

* * * *

[12.179] THE COURT: Was Mr. Cannon prejudiced against you on racial grounds?

BY MISS CLARK:

Q In the way he handled your problems relating to strand cast?

A Mr. Cannon's black.

THE COURT: That doesn't answer the question necessarily.

You would agree he was not prejudiced against you because of your color?

THE WITNESS: I would agree.

* * * *

[13.4] WILLIAM R. MAYO, Sworn.

DIRECT EXAMINATION

BY MR. EWING:

Q Mr. Mayo, are you currently employed by Lukens Steel Company?

A Yes, I am.

Q Are you taking off work today to testify?

A Yes, I am.

Q When did you start at Lukens?

A April 20, 1959.

* * * *

[13.5] Q In 1964 you transferred to a job of heat observer?

A Yes, I did.

Q And at that time were you the only black heat observer at Lukens?

A Yes, I was.

Q According to Exhibit P-493 a heat observer is seniority subdivision number 44, which we have the 1978 employment composition on this chart.

Now, as an observer did you have a daily logbook?

A Yes, we did.

Q What was the purpose of that book?

A Well, the purpose of the log was to pass on to the observer that was coming on behind you what had transpired that day and also to give the supervisor the things that had happened that day in the way of whether or not you had any problems or not, and this is what was passed on to the next person.

Q Where was the book kept?

A We kept it at the NAB building. It was in one of [13.6] the booths that were used to read the charts for the furnaces.

Q Did you find writings in that book that weren't related to the work that you were doing?

A Yes, I did.

Q What were they?

A Well, it was mentioned in the book that Bill [Mayo's] parents must have been gorillas because he sure looked like a monkey.

Q Did you complain to anybody about that?

A Yes, I did. I told my immediate supervisor, Charles Burke.

Q Did he do anything about it?

A Well, he put a notation in the book that he wanted this practice to cease.

Q Did it cease?

A Well, for a few days and then it started up again.

THE COURT: When was this approximately?

THE WITNESS: This was approximately in 1964.

THE COURT: Thank you.

BY MR. EWING:

Q Did you do anything further about it?

A Well, I just tried to do my job.

Q Do you have any reason to believe that Mr. Burke [13.7] knew that it was continuing?

A Well, evidently because it was a daily chart that was kept and he read the book every day.

Q How do you know he read the book every day?

A Well, he would put his signature in and leave messages for the shifts, what he wanted them to do.

Q If you wrote comments in there, would he respond to them?

A Yes, he would.

Q Did you complaint to the union about this problem?

A Yes. I talked to Mike Reach, and I told him what the problem was. And he said let him work on it and he would get back to me.

Q Did he get back to you?

A No. I am still waiting on that telephone call.

Q Maybe we can ask him today.

THE COURT: You don't think you really will get it?

THE WITNESS: No, not really.

BY MR. EWING:

Q Did the union have any general reputation in the plant with respect to its handling of problems of black employees that you were aware of?

MR. SILBERMAN: Objection, Your Honor, on two grounds.

[13.8] THE COURT: As of what time does this question relate to?

MR. EWING: It relates at this point as of 1964.

MR. SILBERMAN: Two grounds. First under the Federal Rules of Evidence reputation testimony is not admissible. Second even if it were no foundation has been laid for this witness' knowledge.

THE COURT: Both objection are noted and overruled.

Proceed.

THE WITNESS: I would say that from all the conversations that I have had with all the workers and what I saw myself that the wheels of justice seemed to move quite slow when it involved the black worker.

[13.9] Q Was that different from the way they moved when it involved a white worker?

MR. SILBERMAN: Objection.

THE COURT: Objection overruled. You have a continuing objection.

MR. SILBERMAN: We also have a continuing objection as to the relevancy of these?

THE COURT: Yes, you may.

BY MR. EWING:

Q What was your answer to that question?

A I said, yes, they speeded up when it involved the white worker.

Q Did you discuss the union with a man named Bob Player?

A Yes, I did.

Q Did he have anything to say about it?

MR. SILBERMAN: Objection, your Honor, hearsay.

THE COURT: Overruled. It is just background. Doesn't have much to do with this case.

THE WITNESS: Well, Bob is one of the other older workers at the open hearth pits.

He and my brother-in-law, Harmon Parker, felt that by going to them, the workers had been there for a while, but they could give me some knowledge as [13.10] to how my approach to certain things should be and I asked him about that and Bob, in the course of the conversation, mentioned that in some instances, the wheels of justice move very slow when it involved black workers.

BY MR. EWING:

Q Has the reputation of the union for handling complaints of black employees changed since the time, 1964, 1965?

A I would say, in some respects it has and in other respects it hasn't.

Q Would you explain that, please?

A Well, on some things, where it comes to a black and white having the same complaint, they seem to speed up a little.

And when it's just a black by himself, we go back to the old cliche, well, I'll get back to you.

That type of approach.

Q Now, the remarks in the long book of the observers that you described, how long did you continue to find that kind of remark in there?

A Well, it was on a periodic basis. It was not a weekly thing. I assume the same person was doing—or persons.

Q How long did they continue to be there?

[13.11] A Well, as long as I was in that unit.

Q Did you ever hear of anyone being disciplined for them?

A No, I didn't.

Q Did you ever hear of any other action being taken about it other than that one comment that Mr. —

A Well, other than the one message that Mr. Burke left in the book, nothing else.

* * * *

[13.25] Q Now, on January 3, '77, what was the problem there?

A Well, again we were working the 11:00 to 7:00 shift. I made two electrodes up when I came in, which was 11:00. And I had those made up by about approximately 11:20.

I was putting lime in the furnace when foreman McLucas came over and informed me that he wanted another electrode made up. I told him that it was a policy to make two, and that is all I was going to make.

I was subsequently written up for this again.

Q Did you know of him requiring other helpers to make up more than two electrodes?

A No.

Q Now, on January 8, 1977, what was the problem there?

A Well, we were working on the 7:00 to 3:00 turn. The furnace was ready to tap at approximately 7:01.

There was no hot coat there. So on the furnace that [13.26] I was working on it was possible to tilt this furnace back to a degree where the steel would not run out if you took the plug out. And this is what I did, and I was written up for this too.

Q Was that also by McLucas?

A Yes, it was.

Q Do you have any reason to believe that McLucas was discriminating against you on account of your race in these disciplines?

A Well, when McLucas was put on foreman there were certain remarks made that he was out to get certain people and Bill Mayo, Lawrence Hubert happened to be two of them. And Lawrence Hubert and Bill Mayo happened to be black.

Q Were some of them white also?

A No whites were mentioned. He mentioned two names.

Q Now, looking at P-893—before that, did you complain to the union about any of this?

A I filed a harassment suit against Gary McLucas with "Yi" Brown.

Q When you say a suit, do you mean a grievance?

A A grievance. A letter was sent down, I assume, because Mr. McLucas started acting almost human for the next week or so.

Then the whole thing started again.

[13.27] In the interim I took another job, which was the CAB operator. So I didn't come in contact with is this person other than I went on the floor or he came into my unit. So I didn't pursue it any further.

Q Did you ever see any letter?

A No. I was under the assumption that beings the harassment stopped that something had been sent.

* * * *

[13.52] Q You didn't go to many union meetings?

A I still don't.

Q And you never ran for or held any union office, did you?

A No, I didn't.

Q The only people that you have ever spoken to about the job the union does for black employees are Mr. Plater and your brother-in-law; is that correct?

A That is true. They were two workers in the open hearth, and I started in open hearth. And these were the men that I went to for advice.

Q And you have never spoken to any white employees about how they feel the union does for them in handling their grievances, do you?

A Well, I didn't feel it was in my place to go around questioning.

[13.53] THE COURT: Just answer the question.

THE WITNESS: No.

BY MR. SILBERMAN:

Q Now, while you have been in the open hearth Cookie Cannon was an assistant committeeman for a number of years; is that correct?

A Yes.

Q And then he became a committeeman for a number of years after that?

A Yes.

Q He is black?

A Yes, he is.

Q Richard Jacks was an assistant committeeman after Cookie Cannon?

A Yes.

Q He became a committeeman; is that correct?

A Yes, he did.

Q Were you here yesterday? Is that the same Mr. Jacks who testified?

A Yes, it was.

Q Now, you knew Jim Brown, didn't you?

A Yes. I knew Jim personally.

Q Used to talk to him quite frequently, didn't you?
A Yes, I did.
Q He would ask you if you had any problems?
[13.54] A Well, not all the time. We talked politics and things of that nature.
Q Sometimes he would ask you if you had problems?
A Yes.
Q You would talk to him about problems you were having?
A That is true.
Q When you went to see Mr. Brown about the McLucas harassment, you weren't dissatisfied with the way Mr. Brown represented you on that occasion, were you?
A Well, I can say that that was the only time that I had any confidence in the union.
Q But you were satisfied with that occasion?
A Yes, I was.
Q And after you filed your harassment grievance—your grievance concerning Mr. Livingston, his harassment of you seemed to stop, didn't it?
A For a point in time, yes. I never came in contact with the man. I would say it did stop.

* * * *

[13.59] HAROLD K. BROWN, having been duly sworn, was examined and testified as follows:

* * * *

[13.93] Q Was the power sweeper job at the same job class that you had at the towmotor operator?
A Not at the time.
Q What was your job class at the time?
A My job was class 8.
Q And what was the power sweeper?
A At that time it was 7.
Q Did that change?
A Yes.
Q What happened?

A Three weeks later, they came to me and said, Brownie, we're boosting the power sweeper up to to class 8. I said, yes. I said, but you're still taking money out of my mouth.

Q Once it was boosted to 8, did you have to take the job?

A Yes, or I didn't have one.

Q Was the wage the same, the job class the same?

A Yes.

Q How about the premium?

A No.

[13.94] Q More or less, premium?

A On the sweeper was less.

Q Did you still have to take the job?

A I had to take the job.

Q Did you file a grievance about that?

A When the men in the refractory and fueling brick shed—when they went on vacation, I had the option of going back up there and he wouldn't let me, Bob Smith, so that's when I put a grievance in about me going back to the brick shed on vacation time.

Q Did Bob Smith say why he wouldn't let you go back up there?

A Well, the only reason why that he didn't let me go back—him and I couldn't get along and he was more or less just fighting against it. He was just trying to hold me back, that's all.

Q Did Bob Smith discriminate against you on the basis of your race?

A On that, yes. That's the reason why he held me down, because I would talk up.

Q Is the document in your file, marked P-1046, the grievance that you filed concerning this incident?

* * * *

[13.95] Q Mr. Brown, you're looking at a grievance which is labeled P-1046; is that right?

THE COURT: You are just asking about an exhibit number?

MS. GARTRELL: I want to make sure he is looking at the right one.

THE WITNESS: Yes.

BY MS. GARTRELL:

Q And this is the vacation grievance that you filed?

A Yes.

Q Was Bob Smith your supervisor at the time?

A Yes.

Q On the last page of this exhibit there is a statement that the disposition at the third step in July of '79 is that it was remanded to the second step so that proper procedures could be followed.

Was this vacation situation resolved to your satisfaction?

A Yes.

Q The next one is marked P-1047. What was this grievance about?

(Pause.)

A This grievance was about two operators were off sick on the power sweeper at the electric mill shop. [13.96] So that left me out doing all the operating.

At the time my long weekend came up, and I asked—in fact I asked my foreman. Then we went and seen Shaw. He's the superintendent at the electric mill shop. He said he couldn't say anything about the sweeper. We have to refer back to our superintendent Bob Smith.

So we did. And Bob Smith said: "No, we are going to leave the sweeper. We are going to use men."

So I said, "Why are you going to do that for?" He said, "We are not going to pay no overtime." I said, "Okay." So he said, "We are going to put men up there to sweep."

So what happened the first—it was on Friday, the first day, Friday. The put one man up there for an hour. The second day, Saturday, they put another man up there for a couple hours. Sunday they didn't put

anyone. Monday the general superintendent of the melt shop, Doug Edwards, came in and he said it sure looked like a hog pen.

So what happened is they got a laborer right out of the labor gang and put him on the sweeper, and three hours they put him on the sweeper. Well, before they did that they said, "Call Brown in." And [13.97] he said, "No."

THE COURT: Who said "no?"

THE WITNESS: Bob Smith, the superintendent of refractory and fuel.

THE COURT: To make a long story short, you filed a grievance and you got some money back; is that right?

THE WITNESS: It took one year.

BY MS. GARTRELL:

Q Did you have frequent job assignment and scheduling problems as long as Bob Smith was your supervisor?

A Yes.

Q Did you believe that those problems were related to your race?

A Retaliation on me.

THE COURT: The question is was it related to race?

THE WITNESS: Yes, that too.

BY MS. GARTRELL:

Q Did you state that to your union representatives when you made these complaints?

A Yes.

Q Do you know why the term race discrimination does not appear in either of these complaints?

[13.98] A It wasn't in there; that is all.

* * * *

[13.116] Q Let me ask you to take a look at Plaintiffs' 1048.

Take a look at the last page of that exhibit.

Have you read that, Mr. Brown?

A Yes.

Q This is another instance like that other instance, where you were called back up to run the lift truck in the brick shed during vacation; is that right?

A Yes.

Q And this was a result to your satisfaction, this grievance?

A I put it in, yes.

Q And it's been resolved satisfactorily to you; is that correct?

A Yes. Now, yes.

* * * *

[13.118] MICHAEL REACH, sworn.

DIRECT EXAMINATION

BY MR. EWING:

Q Mr. Reach, you were president of Local Union 1165, about 1946 to about 1954; is that right?

A That is about right.

Q When you first ran for president of 1165, whom did you run against?

A Thomas Jenkins.

Q Now, you were also grievance committee chairman from 1958 to 1960 or 1962, do you recall?

A '62, I think.

Q And from 1968 to 1970 you were also grievance committee chairman, weren't you?

A Yes.

Q Before you were elected president in 1946, you were a grievance committeeman for a couple of years also, weren't you?

A Yes.

Q And you have been a member of the negotiating committee for Local 1165, negotiating with the company while you were president and also for part of the 1962

negotiations and for the 1968 negotiations; is that right?
[13.119] A Yes.

* * * *

[13.125] Q They assigned blacks and whites to different jobs in different areas in the plant?

A Yes.

Q When did you notice that that occurred?

A I don't know when that came to my attention, but it was just my observation you could see—for instance, when I went into work, when I would go past the 140/206 shears I noticed that they were all blacks working there.

Q And it is your perception that that was due to the company's assignment of people to jobs, is it?

A Not particularly, just my observation. I noticed that they were all blacks.

Q Did this occur while you were president of Local 1165?

MR. SILBERMAN: What does "this" mean?

THE WITNESS: Did what occur?

BY MR. EWING:

Q Would you say the company discriminated in the assignment of jobs?

[13.126] MR. LANDIS: Objection. He can't put words in his mouth.

MR. EWING: I thought that was my question originally.

THE COURT: Everybody stop talking a moment.

Objection sustained. Clarify your question. I don't know what you're talking about.

Did you notice while you were president of the union that there were blacks in one department and whites in another department?

THE WITNESS: I noticed that while I was president of the union, before, and afterwards.

BY MR. EWING:

Q And was this due to the company treating black employees differently from white employees?

A I don't know if you call it treating them differently or what. This is the way they were hired. They were hired into a certain department. It was the employment office for the most part put it that way.

* * * *

[13.132] Q At any negotiations that you attended, did the union ever bring up the subject of segregated locker rooms?

A No, not to the best of my knowledge.

Q To your knowledge, did the union ever raise that issue with the company anywhere else?

A No. As far as I'm concerned, I didn't hear—don't remember any such discussions with the company.

Q In any of the negotiations that you attended, did the union make any proposals aimed at eliminating racial discrimination?

A We were concerned with the full membership when we talked about discrimination, in any way, shape or form, not particularly blacks or Slavish or Polish or anything else. We talked about the membership when [13.133] we talked about discrimination.

Q And you don't recall the union every arguing to the company that any proposals were intended to eliminate racial discrimination; is that right?

A Not as far as I can remember, no.

Q Or to provide more opportunities for minority or black employees?

A No.

Q Did you personally ever handle any grievances which alleged racial discrimination by Lukens?

A To the best of my knowledge, no.

Q Were you aware of any that were handled while you were grievance committeeman?

A No.

* * * *

[13.139] Q Take a look at Plaintiffs' 352, if you will, the 1968 proposals. And you stated that the references to discussed lockers——

A Yes.

Q —that didn't refer to segregated lockers?

A No.

Q Why is that?

A Well, about that time or maybe probably prior to these negotiations Josh Grove had gotten into this thing of desegregating the locker rooms. And he had done—and I give him full credit—he did a good job of desegregating all the locker rooms. He pretty much did that on his own.

Q It was your understanding by 1968 that the locker rooms were already desegregated or in the process of being desegregated?

[13.140] A Yes.

* * * *

[13.145] CHARLES WITTE, sworn.

DIRECT EXAMINATION

BY MR. EWING:

Q Mr. Witte, you work at Lukens now, don't you?

A Yes, sir.

Q And you have worked there since 1940 as a welder in the Welded Products Department except for your militatry service in 1942 to '46?

A Yes, sir.

* * * *

[13.146] Q You have been president of Local 2295 since 1964?

A '65.

Q '65, and a member of the grievance committee since 1958?

A Yes.

Q And you have been a member of the negotiating committee and have participated in all collective bargain-

ing agreements at Lukens at least since 1962, haven't you?

A Off and on, yes, not all of them.

Q Have you missed some of those negotiations?

A Yes. I think it was the '66 I was away. I attended some of the meetings, if that is what you are asking. You are asking if I attended all of the meetings?

[13.147] Q Well, I am asking basically you represented the union at those negotiations?

A Yes, I did.

* * * *

[13.156] Q And in any of the collective bargaining sessions that you've attended, from 1962 to the present, the one that you've attended, you don't recall anyone from either the company or the union raising any question about employment discrimination and racial discrimination?

A Not to my knowledge, no.

* * * *

[13.159] Q Do you recall in 1962, at the collective bargaining negotiations, any consideration of adding a non-discrimination clause to the collective bargaining agreement?

A No, I don't.

Q And you have no opinion on why such a clause was not added in 1962?

A If it were so, the only reason it wasn't there was by oversight by both parties.

* * * *

[13.166] EARL J. ZITARELLI, Sworn.

DIRECT EXAMINATION

BY MR. EWING:

Q Mr. Zitarelli, you were the staff representative of the United Steel Workers International Union who was responsible for Lukens from 1970 to January, 1977; is that right?

A Yes.

Q And as such you have handled collective bargaining negotiations on behalf of the steel workers with Lukens in 1970 and '71 and also in 1974; is that right?

A Yes.

[13.167] Q And you also handled grievances in the four-step and in arbitration during that period?

A Yes.

Q Looking at grievances first, you handled one grievance for a black man who had in your considered opinion suffered racial discrimination by Lukens; is that right?

A One grievance did you say?

Q Yes.

(Pause.)

A I accused the company of one grievance, yes.

Q And you believed he had suffered racial discrimination, didn't you?

A I did.

Q This involved an employee who had been assigned to a job that paid lower incentive pay than the job to which his seniority entitled him; is that right?

A That is right.

Q And you filed and you won a grievance on his behalf; is that right?

A I did.

Q Have you had a chance to learn any more about that grievance since your deposition?

A No, I didn't.

Q But to the best of your recollection this is the [13.168] only grievance you handled in which you allege that the company had engaged in racial discrimination; is that right?

A Well, I said that in my disposition. But since then I recall we had a fellow, a bricklayer or in the gang of bircklayers, that I accused of not being given the opportunity. I added discrimination before we went to arbitration.

Q What was the opportunity that he wasn't given?

A To be a bricklayer, first class bricklayer.

Q This was a grievance to get people admitted to bricklayer?

A Yes.

Q Was that about in 1973?

A I don't recall the time it happened.

Q Do you remember who the person was?

(Pause.)

A Well, when looking over the grievance, we accused the company of not being fair; but it was proven at that time the five white fellows and five black fellows were given the opportunity and passed it.

So with that testimony or with that evidence we withdrew the grievance.

* * * *

[13.170] THE WITNESS: Yes. I would like to say at this time I received a stroke in 1977 and affected my right side and my speech and my way of thinking.

THE COURT: You are doing fine.

* * * *

[13.171] Q Now, Lukens administered tests for various jobs, didn't it?

A Yes, they did.

Q And do you recall ever discussing whether any of Lukens tests discriminated against minorities?

[13.172] A No.

Q Or arguing to the company that they should be eliminated because they were discriminatory?

A No.

* * * *

[13.183] Q What steps, if any, did the union take to broaden seniority systems?

A Well, the main thing that we got there was the posting of the plant-wide posting.

Q And what was the purpose for the union's negotiations of plant-wide posting at Lukens?

A To give everybody an opportunity to move up.

Q To move into units where they hadn't been before?

A Before.

Q Further down in that paragraph, do you see a reference to making other adjustments regarding such matters as training?

A Where are you reading?

Q The same paragraph, the fourth paragraph of [13.184] that exhibit.

What, if anything, did the union do at Lukens with reference to matters regarding training?

A Well, I saw to it that we incorporated what we had from the international, such as on page 115, I believe——

Q Now, what's the document that you're referring to there, Mr. Zitarelli?

A That's the agreement dated August 1, 1971.

Q The collection bargaining agreement?

A Yes, it is. On page 115, we incorporated appendix H that provided for testing.

Q Do you remember anything specifically related to training?

A Yes, we did that too. There were certain jobs that we got—I believe truck drivers was one job that we took care of.

That they wouldn't have to take the tests, as such, but they trained for jobs, truck driving.

Q And that was something that the union did in negotiations at Lukens?

A Yes, it is.

Q And that same paragraph that you just had been looking at in P-63, the fourth paragraph there, do you see a reference to apprenticeships?

[13.185] A Yes.

Q What did anyone at Lukens do with regard to apprenticeships?

A I saw to it that it incorporated, in the same agreement, on page 117, 116, under the title, Appendix I, with

the apprenticeship training memorandum of understanding. I saw that it got into the agreement.

Q Did that have anything to do with opportunity for black employees at Lukens?

A It was opportunity for everyone at Lukens.

* * * *

[13.188] Q You were asked whether the union had done anything at Lukens to change seniority procedures to make it easier for black employees to move into all-white units.

Did the union do anything at Lukens to make it easier for all employees to move into any unit that they desired regardless of their race?

A Yes, for all of the employees. We never for [13.189] any distinct group as such.

* * * *

[13.247] OSCAR H. YORK, Sworn.

DIRECT EXAMINATION

BY MR. SEGAL:

Q Mr. York, when did you start at Lukens Steel Company?

A April of 1956.

Q And what position did you start in?

A I started in the labor gang, 140 labor gang.

Q And are you currently working for Lukens Steel?

A Had I been currently?

Q Are you currently. Are you today working for Lukens Steel?

A No; I'm on disability.

Q When did you go on disability?

A My last day of work was November 11th of 1976.

Q Will you look for a moment at Plaintiffs' Exhibit 1054.

A Yes?

Q Under "Name" it says "_____" and

[13.248] "C.M."

Do you know what the "C-M" means?

A No.

THE COURT: We can all guess.

* * * *

[13.255] Q Now, did there come a time in which you decided that you didn't want to work as a temporary general foreman anymore?

A Yes.

Q About when was that?

A The end of '63—'72 I'd say.

Q '72?

A Yes.

Q Why didn't you want to work as a temporary general foreman?

A At the time, my first marriage, I was having problems and the hassles that I was having at home I didn't want to carry over to the mill. I just couldn't contend with the type of things that they were doing.

One, I was working over there. We were all working these extra days. I was the only general foreman who hadn't got paid the sixth day for vacation.

[13.256] When it came down to my turn, there was some reason or another that they cut it out.

Q They were giving you vacation time on the basis of a five-day week, rather than a six-day week?

A Right. Plus the fact that what was happening to Mr. Cazzill and some of the hassles that I was having with the general foremen, the other general foremen, which were white, in general, by leaving bad information, et cetera.

These things when I would go in and relieve my general foreman, usually I would say at least 50 to 60 percent of the information was out of place, in the wrong place and I visually had to go out and check everything before I would start my shift.

Q These were the reasons that you decided not to remain?

A Absolutely. There was too many hassles.

Q And as temporary general foreman, who did you tell?

A I had told Fred Nill. He was superintendent.

Q He was the superintendent?

A Yes.

Q Is he white or black?

A White.

Q What reasons did you initially give Mr. Nill for not wanting to remain as temporary general foreman?

[13.257] A Well, initially, I didn't want to get into the feeling as far as being discriminated against at the time.

This was an awful hard thing to prove.

Now, I had found this out during the years that I was shop steward. I found that I was able to work better by not saying discrimination, but just by proving that they were wrong and getting some records to verify this.

* * * *

[14.3] JAMES H. JONES, sworn.

DIRECT EXAMINATION

BY MR. EWING:

Q Mr. Jones, you're currently president of the Negro Trade Union Leadership Council here in Philadelphia, are you?

A That is right, sir.

Q And from the early 1940s until you retired in 1970 or 1972 you worked for the United Steel Workers of America?

A That is right.

Q And before you retired you held the title of special assistant to the president of the International Union?

A Yes, I did.

Q During your time with the steel workers, did you help to organize a number of local unions?

A Yes, I did.

Q In fact a large number?

A A large number is right.

[14.4] Q When new local unions were organized and seniority systems were instituted, didn't the International Union often allow the local unions to determine the specific units and the jobs to go into each unit in the light of local conditions?

A Sometimes that was the case, but I might add that the International Union while it gave latitude to local unions to make certain decisions and so forth and so on the International Union never relinquished its responsibility and its right to make sure whatever change that was made was not in violation of the union's constitution and to make sure that that kind of an agreement that they made did not discriminate against any person, whether it is black or white.

Q Now, among the local unions that you helped to organize was the steel workers union at Lukens Steel Company, wasn't it?

A Very true, sir.

Q And you put in a lot of work on that in the early 1940s?

A Yes, I did.

* * * *

[14.6] Q Now within the plant at Lukens did you find that black workers were relegated to certain areas and some of them couldn't get out of those areas?

A Yes, I did.

Q And that some seniority units or parts of the plant were all white and others were all black?

A Yes.

Q Now, in all your work with these two workers around the country you've seen some seniority systems in operation in many places, haven't you?

A Yes.

Q And you are aware that if seniority isn't applied adequately and fairly it will surely result in discrimination?

A Yes.

Q And isn't it true that sometimes unit and departmental seniority systems have been used purposely to keep black workers in certain areas?

A I would say that goes both ways. I would say yes. [14.7] But I might add that as far as the union itself was concerned some of those units were in effect before the union got there and solely because the union negotiated a contract and left some of those units the way they were did not mean the union itself was negotiating a discriminatory policy because you know and I know, at least I know, when you organize a plant you have your first collective bargaining agreement. You are not the strongest person in the world. Consequently some changes could be made and some changes could not be made.

Q Sometimes both systems did exist?

A Yes.

Q And while you don't know whether the seniority system at Lukens was adopted for a specific reason, the conditions were there, weren't they?

A The conditions were there when we got there, when the union first organized. And prior to that the condition did exist in Lukens at that time.

* * * *

[14.9] Q Did you have any discussions with Lukens' management regarding the issues over racial segregation and discrimination in job assignments at Lukens?

A Yes.

Q And at what time did you have those discussions?

A That was in the early days of the negotiations. I wasn't the negotiator but because of the relationship [14.10] and because of what I had done to campaign, I

felt it was my responsibility to remind and tell the company what I thought ought to be done.

Q What was it that you told the company?

A That segregation had to go; discrimination in all forms had to go, and go as soon as possible. That I did.

THE COURT: When did you say that?

THE WITNESS: Beg your pardon?

THE COURT: When?

THE WITNESS: That was the early days—right after we won the National Labor Relations Board election and as soon as we started negotiation.

THE COURT: When? What year, approximately?

THE WITNESS: About 1942.

THE COURT: Thank you.

BY MS. CLARK:

Q Was there specific mention made of segregated facilities at the plant?

A Yes.

Q And what [did] you say to Lukens' management on that subject?

A That it was a condition that the union didn't like and the union would do everything possible to [14.11] change.

Q Did you have subsequent conversations with Lukens' management on that subject as well?

A Yes.

Q Would you describe those discussions?

A Well, there was one instance where I thought that all of the segregated facilities had been removed and I found out they had not.

It came to me by somebody from the Human Relations Commission, State of Pennsylvania. It was then I found it out and I discussed it, and the company said, yes, we were supposed to make the changes but we didn't do it, but it will be done now, and it was done soon thereafter.

THE COURT: When was that?

THE WITNESS: Time frame-wise, Judge, I honestly couldn't give it to you right now.

BY MS. CLARK:

Q Would that have been in the neighborhood of 1966?

A It could have been. I think the record would show that, wouldn't it? I honestly don't know.

Q Why was it that time you thought the conditions had been changed?

A Because of my discussions with the company [14.12] over the issue of segregated facilities.

They recognized it and said they were going to change them. And that's why I thought the issue had been resolved.

Q And had you had discussions between 1942 and the mid-1960's on that subject with Lukens' management?

A Sometimes; a couple of times during that period of time frame.

* * * *

[14.31] BENJAMIN PILOTTI, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. GARTRELL:

Q Mr. Pilotti, what is your present job at Lukens Steel Company?

A I work as a plumber in the pipes department.

[14.32] Q That's a trade and craft job; is that right?

A Yes.

Q You've been active in Local 1165, the Steel Workers Union at Lukens since 1958, correct?

A Yes.

Q And that year you were elected as a trustee of Local 1165?

A Yes.

Q In 1962, you were elected as a committeeman; is that right?

A That's right.

Q And you served as a committeeman ever since?

A Yes.

Q You were elected vice president and chairman of the grievance committee in 1973?

A Yes.

Q And you've served since 1975 as president of 1165?

A Yes.

Q You've been on the negotiating committee since 1968?

A Yes.

Q And have you been on it every year that the contract was negotiated since that time?

A Yes.

Q Are you presently on the negotiating committee [14.33] for 1980?

A Yes.

Q Is it correct to say that there are approximately 2600 members of Local 1165?

A Approximately that many, yes.

Q And since 1956, have all hourly employees at Lukens been required to join either 1165 or Local 2295, the Steel Workers Union?

A After the 30 days of being an employee at Lukens, yes.

THE COURT: Since what year?

MS. GARTRELL: 1956.

THE COURT: How many members did you say there were?

MS. GARTRELL: 2600.

BY MS. GARTRELL:

Q Do you know how many members there are of 2295?

A At the present time?

Q Yes.

A Just a rough guess, about 80.

Q About 80?

A Yes.

Q Do you know the greatest number of members at 2295 it has had throughout its history?

A I understand that they were at their peak, at [14.34] 5 or 600 people. That was during World War II.

* * * *

[14.37] Q Now, in terms of the local's relationship to the International union, is it the International which signs the collective bargaining agreement?

A My experience as president, okay, when we sign the agreement I was asked to sign it as the president of Local 1165.

Q Is the International the recognized bargaining agent?

A Yes.

Q And is there an International staff representative at Lukens at all times?

A Yes.

Q And does that staff representative handle or take charge of all arbitrations on behalf of Local 1165 and the International?

A It takes care of all four step grievances and arbitrations.

Q And is that staff representative in charge of local negotiations, contract negotiations?

A Yes.

Q From the time you went to Lukens in 1946 and the [14.38] time previous to that, which would have been what, '44 or '45, you were aware of segregated locker rooms, were you not?

A I was aware of segregated locker rooms when I became a journeyman and was given assignments. And the assignments referred to the 120, an example, welfare building the black side or the white side.

Q Only at that time they said colored, didn't they?

A Colored, yes.

Q Do you remember what year you became a journeyman?

A I would say 1948.

Q And in addition to the 120 welfare building, did you observe that there were other segregated locker rooms or wash rooms?

A The 140 welfare building and in the nickel clad building and in the open hearth area they refer to as white side or black side.

Q And, Mr. Pilotti, you don't personally know of any action taken by Local 1165 to end the segregation of locker rooms and wash rooms at Lukens, do you?

* * * *

[14.39] Q And by the 1960s, the late 1960s, you were also aware, were you not, that there was some subdivisions which were almost entirely black?

(Pause.)

A Entirely black.

Q Almost?

A Yes. There was subdivisions that were all black—almost all black.

Q What were those?

A Well, the track gang. It used to be a unit and [14.40] then a pool job and made it back to a unit. They were mostly all black.

Open hearth pits, they were mostly all blacks. I don't know how many whites were in there, but there were whites in there.

Q Did you also know at that time that there were some mostly black units which had lower than average job classes as the highest job class in the unit? For example, the highest job class was no higher than a 9 or a 10?

A Well, that would be the track gang; the highest job there would be the 9, the gang leader, and you had 7s and 4s.

Q Do you know of any subdivisions which were mostly white in which the highest job class was no higher than 10?

(Pause.)

A I can't think of any right now.

Q Were you ever aware of any?

A. No.

* * * *

[14.58] Q Have you become aware, Mr. Pilotti, that blacks are discharged from Lukens Steel Company supposedly for just cause in disproportionately high numbers?

A With my experience, since I was chairman of the grievance committee, I really don't have the number. It seems to me that maybe blacks would outnumber the whites, [14.59] yes, but I don't have the right numbers.

Q Would you say that discharged grievances or discharged cases are the highest priority that the union has?

A I made it my business that would be the highest priority.

Q Are they generally the highest priority of all the grievances?

A As far as I'm concerned, yes.

Q Did you become aware, as well, that there are a disproportionate number of probationary employees who are black, who are discharged for cause?

A Well, I wouldn't have no record of that, although right now it's the policy of our local union, if anyone reports to the union hall and is discharged during the 520 hours, we file a grievance, just for a matter of record.

Q Is that for anybody who's black or anybody?

A Just blacks.

Q When did you start that practice?

A We were advised—I went to a civil rights conference in Pittsburgh, approximately a year ago, or at the end of March in '79 and it was advised by the civil

rights director in the international—to keep a record of black employees discharged during the [14.60] probationary period.

Q You say you were advised a year ago. When did you actually start to do it?

A Since we got back from that conference.

Q A week after or ten months after?

A. I assume, we got back, anybody who came to the union hall and made a complaint, that they were discharged, that we filed a grievance and made a record. I have knowledge of one case that I personally filed a grievance for.

Q Who's that.

A I don't have the name. I don't have a name.

Q You know what unit he or she was in?

A No, it was a male.

Q Do you remember what his job was?

A No.

THE COURT: What happened to the grievance?

THE WITNESS: I couldn't answer that. He went through the grievance procedure. The chairman took care of it.

BY MS. GARTRELL:

Q Did you instruct your committeeman, assistance committeeman and shop stewards that they should now begin to advise employees or probationary employees, [14.61] that if they are fired and they think it's racial, they should file a grievance?

A I'm pretty sure that the chairman did instruct the committee to do that.

He was at the same conference as I was.

Q When you were at that conference and they gave you these instructions, did they tell you why they were so instructing you?

A They just wanted a running record, just to see if it was racial that the people didn't make the 520 hours.

Q Isn't it true, Mr. Pilotti, that since 1974, the contract has offered special protection to probationary employees, who think they have been fired on the basis of race?

A Not in our language, anyway.

During the 520 hours, that they were discharged strictly at their discretion.

* * * *

[14:103] Q Mr. Pilotti during the years when segregated locker rooms were in existence at Lukens, were you in a position from which you would have known about efforts being made by other union officials to end the segregation in those locker rooms?

A No.

[14.104] Q For what period of time or beginning at what time were you in an integrated locker room?

A Well, if my memory is right, the craft shop, that's the pipe shop, the rigger shop, the miscellaneous mechanics and the welding shop moved into the 84 Building, approximately 1951, and that locker room that we were reassigned to, that was—there were blacks in that washroom; '51 or '52, one of those two years.

Q What area of the plant did those black employees work in the area who were assigned to that locker room?

A There was the weld shop; the gentlemen in the weld shop was in that washroom and since we were just adjacent to the open hearth pits, some of those fellows—you know, there were open lockers that kind of got in there, yes.

Q Were there grinders in your locker room?

A Yes, there were grinders, also in the locker room, but they also came over in later years, '55 or '56.

Q You were asked, Mr. Pilotti, if you're aware of any subdivision that was primarily white, which had a job class no higher than 10.

In other words, 10 or lower is the highest job class.

[14.105] Do you know what's the highest job class in the central [stores] subdivision?

A I'm pretty sure that's a 7.

Q What about the Willowdale warehouse?

A Willowdale warehouse would be a 10. That would be the gang leader.

Q What about the truck drivers' subdivision?

A That's a 10.

* * * *

[14.108] Q When you argue in a discipline case that an employee was not disciplined for a just cause, can you explain how that applies if you believe there are other guys who did the same thing and weren't disciplined?

A We'd call that discrimination.

Q Does the just cause standard itself, without the help of Article 18 of the contract—

A Right, I would say that is true. You have to prove was it for just cause.

Q Have you in fact argued discrimination in discipline cases?

A Yes.

Q Have you argued race discrimination in discipline cases?

A Yes, I think I gave some examples.

THE COURT: Did you use the word race discrimination in making that argument?

THE WITNESS: Yes.

Q Do you recall any particular recent cases in [14.109] which that was done?

A As I said before, Paul Butcher—

Q In the discipline case.

A Oh, I'm sorry. In the discipline case, I think Mr. Dantzler?

Q Which case was Mr. Dantzler?

A That's where he was discharged—

THE COURT: We're all familiar with Mr. Dantzler's case.

BY MS. CLARK:

Q I'm going to show you a document that's marked Union 262, and I'll ask if that refreshes your recollection, whether you've ever put the words, race discrimination into a grievance?

A I handled the case, so that's what I put in the grievance.

Q And that says, discriminated against me because of my color?

A My color, yeah.

Q And, for the record, who was the employee there?

A James Williams.

THE COURT: What's the date?

THE WITNESS: It was filed on 11/19/75.

* * * *

[14.113] Q Was there another election that was protested at the same time as Leon Whitfield's?

A Yes.

Q And what was the outcome of that protest?

A The International overturned the election and awarded the job to a Bob Coffee instead of Howard Yost.

Q Was Bob Coffee the previous incumbent in the office?

A No.

Q What was he?

A He was just a Shop Steward.

Q Was he a candidate for the election?

A Yes.

Q And do you know whether Central Stores, [Willowdale] Warehouse and the Truck Subdivision are predominantly white or black?

A Over what period of time, now—

Q Mid to late '60's.

A I would say there were blacks and there would be mostly white.

* * * *

[14.115] Q Now, in this application of just cause in disciplinary cases, I think you used the phrase somebody has been doing the same thing only they were treated differently.

Isn't that the standard defense you use practically in every discipline case? When you, the union, are challenging the company's discipline one of the reasons you use the challenge is because somebody wasn't treated the say way?

A Not in all cases.

Q Not in all cases but in most of the cases that is the argument you use; isn't it?

A I would have to look at the case and look at the merits of that case.

THE COURT: That is the argument if they can have some evidence on that subject.

BY MR. LANDIS:

Q And you use that on behalf of whites or on behalf of blacks?

A Yes.

Q And it has nothing to do with race, does it, as far as the argument is concerned?

A No, no.

* * * *

[EXCERPTS FROM DEPOSITION OF HUGH P. CARCELLA]

[14.136] MR. EWING: We have some excerpts of the deposition of Hugh P. Carcella I will have read into the record.

* * * *

[14.137] MR. EWING: "Question: Mr. Carcella, you were district director for the United Steel Workers; is that right?

"Answer: Right."

On page 3 going on to page 4.

[14.138] "Question: What was your District?

"Answer: District 7.

"Question: And what is the area that that covers?

"Answer: District 7 covers the Eastern County, mainly Philadelphia, Reading, Lebanon, York, Lewistown and up into Bucks County, down into Delaware and clean up into Altoona.

"Question: And that includes Coatesville, does it?

"Answer: It includes Coatesville.

"Question: What years were you District Director?

"Answer: I have twenty-five years of it. I believe I first became District Director in the 1950s some time. Let me see now, let me go back. I retired in '77, I guess. I served for four or five consecutive terms, four-year terms. It would be the overlapping, it gives you three months or so both ways.

* * * *

[14.144] "Question: I will show you a letter dated August 5, 1966 which I will ask to be marked Carcella Exhibit 1. (Handed.)

"(Whereupon Exhibit Carcella 1, Letter dated August 5, 1966 from T. J. Ryan to Hugh Carcella—Two Pages, was marked for identification.)

"Question: Have you finished reading the letter?

"Answer: Yes, just about.

"Question: Let me know when you are finished.

"Answer: I thought I would find some place in here where we might have given them a an extension of time to get these things done.

"Question: I was going to ask you if you [14.145] recalled receiving the letter. Do you recall having received that?

"Answer: I don't, but I believe I may have received it.

"Question: Do you recall whether you made any response to it?

"Answer: I probably would have responded to it, yes.

"Question: Do you recall what your response was?

"Answer: No.

"Question: But is it normal that you recall having given some extension?

"Answer: It sticks with me that we may have done that. See, we were the second or third District in steel and of course we were flooded with these kinds of complaints. Some of the Districts are apt to get all of their work out with one or two girls. We had to have seven or eight.

* * * *

[14.154] "Question: During the time that you were district director before 1966, did you make any efforts to end any segregation that existed in locker facilities or other facilities at Lukens?

"MR. HOFFMAN: I would object to the form of the question.

"THE WITNESS: Did I make any efforts to correct that situation?

"MR. EWING: Yes.

"THE WITNESS: Yes.

"BY MR. EWING:

"Question: What did you do?

"Answer: I talked to management about it and I got an assurance I believe that this would be taken care of, but it couldn't be done [14.155] overnight or in a week or it couldn't be done in two days or three. It would take a little while, but it would be accomplished.

"Question: Whom did you talk to?

"Answer: Five or six people I could have talked to, but I don't remember which.

"Question: Who would the five or six possibilities be?

"Answer: Well, some of them are not there anymore.

"Question: That's all right.

"Answer: 'Whitey' Mullestein could have been one of them, the present industrial relations director could have been the other one. It could have been the other one; it could have been another one.

"Question: Do you remember that person's name?

"Answer: Ryan, I think.

"Question: Ryan?

"Answer: Yes. Now, I believe that these are people that I might have talked to about that.

"Question: Do you recall when you spoke to them?

[14.156] "Answer: No.

"Question: Do you recall how many times you spoke to them?

"Answer: Very frankly, I think I only spoke to them on one occasion and I was satisfied that they were sincere in their position that they would do the best they possibly could. However, it would take a little while before all of these things would be cleaned up and it was made known to the local union. And they understood it because of the real large order that was presented to them.

"Question: What called this situation to your attention?

"Answer: Oh, I don't know whether it was some member from down there that raised hell or whether the local union officers raised, but somebody raised hell about it, which was fine because it should have been a condition that never should have existed really.

* * * *

[14.160] "Question: Besides speaking to Mr. Ryan or Mr. Mullestein—

"MR. HOFFMAN: Or someone.

"MR. EWING: Or perhaps someone else, are you aware of any other actions that the steelworkers or either of the locals took to bring that about, the integration of the showers or locker rooms?

"THE WITNESS: You mean, at Lukens?

"MR. EWING: Yes.

"THE WITNESS: I think the only other thing was the constant raising of hell on the part of the black people and the black people fighting for it. And let me assure you that there was some opposition. I am not sitting back here and kidding nobody.

"BY MR. EWING:

"Question: Do you recall what the black people did to fight about it or raise hell about it? Do you recall any examples of that?"

MR. SILBERMAN: Objection, your Honor. No first-hand knowledge and no foundation—

THE COURT: You don't think the witness has any first hand knowledge, whether he recalls anything [14.161] or not. Who else would know better than he, whether he recalls or not? Objection overruled.

"No, they didn't go out and murder or shoot anybody. They didn't go out and beat people up. They let it be known locally at local union meetings and local union halls and they were pressuring the local union officers to do something about it and they pressured us to do something about it. And during the terms of the agreement, while you sometimes find yourself in a position where you cannot do anything about it immediately, but you can do it in the future. And this I think is about what the position ended up like in Lukens."

* * * *

[22.51] ANTHONY GIANOTTA, sworn.

DIRECT EXAMINATION

BY MR. SILBERMAN:

Q Mr. Giannotta, you are presently retired; is that correct?

A Yes, sir.

Q Prior to 1975 you worked for Lukens Steel Company; is that right?

A Yes, sir.

Q When were you first hired at Lukens?

A 1936.

* * * *

[22.52] Q Now, take a look at Union 512A in the folder in front of you. Does that correctly state the positions you held from 1937 until you retired in 1975?

A Yes, sir.

Q You were a Foreman and General Foreman from 1958 on; is that right?

A I was Foreman and General Foreman, yes, sir.

Q How were you first hired at Lukens?

A When I first tried to get a job at Lukens I went to the Employment Office in 1933 to '36. And when I went in there approximately there was about 200 people, 100 or 200 people in the office and you signed your applications. Then [22.53] they would call names out and I didn't know how the heck they got all these names. And I went there for over two and a half years trying to get a job and could never get a job. Called different jobs and never could get a job. I asked Lou Irwin who was in the office, the Employment Office, he said, "I don't know."

So I went back and seen my stepfather and I told him. "I can't get no job at Lukens." He said, "I will see what I can do." After that, why he told me, "Tomorrow morning you go down to Lukens' office." I goes down there and they call my name out. They gave me a slip to go see the Superintendent and when I went in and seen the Superintendent he gave it to the Pit Superintendent and the Pit Superintendent signed the slip and sent me back to the Employment Office and I was hired.

Q And you started working in the area where your stepfather worked?

A Yes, sir.

Q It is your understanding that is how other employees were being hired at that time in areas where they knew people?

A Yes, sir.

Q Now, when you started work at Lukens, did Lukens have departments?

A Lukens had what they would call department seniority in the subdivisions which was Open Hearth Department where I [22.54] started at and they had a subdivision that was the Pits, that was the subdivision of the Open Hearth, the Floor was a subdivision of the Open Hearth, Scrap Yard was the subdivision of the Open Hearth, Rigger, Pipefitters and Plumbers, a subdivision of the Open Hearth and they also had a Labor Gang at that time in the Open Hearth.

Q Was there a seniority system in effect at that time?

A If they had it they never followed through with it.

Q If an employee wanted to promote from one job in his subdivision to another, what rights did he have?

A No rights at all. The boss put you where he wanted to put you.

Q If an employee wanted to transfer from one subdivision to another subdivision, what rights did he have?

A He had no rights at all at that time.

Q If there was reduction in force, what rights did the employee have to protect him from layoff?

A No rights at all. They just laid off anybody they felt like it.

Q Was it your experience that the bosses used this power that they had to discriminate?

A Yes, they did.

Q Were there certain areas in the plant or certain jobs that Italians couldn't get at that time?

A At that time, yes.

[22.55] Q Some jobs that blacks couldn't get at that time?

A Yes, sir.

* * * *

[22.69] ALBERT COOPER, sworn.

DIRECT EXAMINATION

BY MR. SILBERMAN:

Q Mr. Cooper, you are presently employed by Lukens; is that correct?

A That is right.

Q And when did you start work there?

A I first started at Lukens sometime early 1937.

* * * *

[22.70] [Q] Have you been on the Executive Board of Local 1165 continuously since 1950?

A Yes.

Q You were on the negotiating team in 1954 when you became president?

A Yes. I came in on the tail end of the negotiations then. The negotiations had already started. As a newly elected officer I was included in the windup.

Q And then you were on the negotiating team in 1956; is that right?

A That is right.

Q And you have been in every negotiation since 1962; is that correct?

A Since '62, yes.

Q Have you ever served on any union committees?

A I have served on the Grievance Committee as this outline shows; the Legislative Committee, the Community Services Committee, Insurance, Publicity. That is most of the big committees. There may be some minor ones I just can't remember right now.

Q Do you attend membership meetings regularly?

A I do.

[22.71] Q How long have you been doing that?

A I attend as many meetings as I can ever since I became active in the union back in 1949 or '50.

Q And is the same true about Executive Board meetings?

A That is true.

Q What is the responsibility of the Executive Board?

A Well, the Executive Board is supposed to run the meeting in the absence of a membership meeting.

Q When you say run the meeting, you mean run the union?

A I mean run the union, I should say.

* * * *

[22.73] Q Did you have any personal experience in your first year or so at Lukens with the discretionary system for handling layoffs?

A I did. I was hired as I said in 1937, got laid off just before Christmas in 1937. At that time I wondered why I am being laid off because they are keeping people who came into the department after I did. So I asked the question. I said, "Jones, how come I am being laid off? You are keeping"—

Q Who is this Jones?

A Jones Rubicam was my Superintendent. "How come you are laying me off, you are keeping Jimmy over there. He hasn't worked here as long as I have." He said, "Well, Jimmy is married. You are single." So I said, "How about Joe? He has less time than me and he is single. Well, he helps to keep his folks," so I was laid off.

Q Now, when you started working Plant 4, what was the racial composition of the work force there?

[22.74] A It was mixed.

Q What jobs did the blacks hold in Plant 4?

A They held Labor, Floater, all the lowest jobs.

Q When you say lowest, you mean the lowest paying jobs?

A The lowest paying, right.

Q Was that because the black employees at Plant 4 had less time than white employees?

A No, not because they had less time because—although I wasn't too much aware who came where myself, when the first seniority list came out later years it showed that the top man seniority-wise was Lou Townes. He was black.

Q Take a look at Union 514 if you will. Are there any other blacks on the top five or six?

A Luke was number one. Number four was John Townes.

Q What jobs did they hold?

A Both had the low jobs, labor jobs.

Q Now, back in those days how was it decided how much an employee would get paid for a job?

A Well, there were supposed to be rates of pay. However, you are never sure. You may work alongside a guy doing the same job and he may be making more money.

Q Doing the exact same job?

A True.

* * * *

[22.76] Q Now, you said you became active in the union in 1949 or 1950; is that right?

A It was somewhere around that time. I have never been able to tie it down exactly.

Q Now, let me ask you to take a look at Exhibit 246 and ask if you can identify that for me.

A Well, that is a picture of the first by-laws that I remember.

Q Now, directing your attention to Article II, Section 1, where it says "Object," has language to that effect been in the 1165 by-laws ever since you became active in the union?

A You mean to unite this local union regardless of race, creed, color, nationality, all eligible employees?

Q Right.

A That is right.

Q It has been there ever since you have been active?
A Yes.
Q How about Article III, Section 1, the eligibility members language? That has been in the by-laws ever since you [22.77] have been active?
A All working men and working women, regardless of race, creed, color, nationality, that is true, that has always been in our by-laws.
Q Was it usual or unusual in Coatesville in those days to have an organization that had accepted blacks and whites for membership?
A Very unusual. The union was the only organization I know of that had both blacks and whites. Other organizations are either all black or all white.
Q When you started attending union meetings, were the meetings integrated or segregated?
A They were integrated.
Q Were there blacks holding union office in the union?
A From the blacks holding offices in our union—
Q Exhibit Union 800, is that the current by-laws?
A Yes, it is.
Q Now, why did you run for President in 1954?
A Well, I was a young fellow, had no intent to run for President. I was [approached] by Vernon Greenlee. He asked me to run.
Q What was Mr. Greenlee's race?
A Black.
Q Who nominated you for President?
A Well, at the time they nominated me I didn't attend [22.78] the nominating—I was in the hospital. I understand Vernon Greenlee—
Q Was Vernon Greenlee your running mate or Vice President?
A He was.
Q Elected in 1954?
A He was.
Q In 1956?
A In 1956 we ran and we won.

Q Take a look at Union 423, again I apologize for the copy. Is that a list of the Executive Board during your second term as President?

A This is part of the Executive Board. It doesn't include the trustees or otherwise it should have five trustees and two guards and guides.

Q Looking at the members of the Grievance Committee, are any of them black?

A Yes. Vernon Greenlee and Isaac Whitaker.

Q Looking at the Assistant Committeemen, are any of them black?

A Harry Redner, and Howard Snow.

Q Was it unusual for the union to have two black Grievance Committeemen and two black Assistants?

A Oh, no, not at all, we could have more.

Q Was it unusual for the union to have a black Vice [22.79] President?

A No. Preceding me there had been—preceding Vernon Greelee there was a black Vice President.

Q Who was that? If I said the name Raymond Wilson, would that help?

A Raymond, Raymond Wilson. That is it.

* * * *

[22.85] Q Mr. Cooper, there has been testimony in this case that in 1962 the basic steel industry got a nondiscrimination clause and Lukens did not have such a clause added to its agreement. Do you know why that was?

A Well, in 1962 when we went in talking with the company, the company said they already had an agreement with the union.

Q When you say you went in, when the Negotiating Committee went in for its first negotiation session?

A We said, "Wait a minute, we just came in to talk to you. How come they said they had an agreement with Mr. Car- [22.86] cella?" We went back and got Mr. Carcella on the telephone. We said, "Huey, what is this?

We would like for you to come up and talk to us about this." He said, "I am rather busy right now, we will come down to see you. When are you available?" We went down to talk to him. He said he met with Lou Irwin out in Pittsburgh and he said he shook his hand and had agreed we were getting everything that came out of the big steel agreement. We said, "Look, Huey, we have a few local things we would like to talk about, you know. We don't like this." He said, "I didn't know that. I am very sorry. This won't happen again. But I did tell Lou Irwin, we did have a settlement based on the big steel agreement."

Q Were your local negotiations in 1962 long or short?

A Short.

Q Just so it is clear, it is your understanding Mr. Carcella and Mr. Irwin said you would get everything that came out of basic steel?

A That was our understanding.

* * * *

[23.3] Q Mr. Cooper, when we left off yesterday, we were at Union 661.

Would you explain what that document is?

A This is a call to a legislative conference in Washington by our district director.

Q And what does the note, the handwritten note, at the bottom mean?

A You mean the 6364 check number?

Q That is right.

A That is the expense check for our delegates.

Q You sent—Local 1165 sent delegates; is that correct?

A Our Local 1165 sent delegates to the conference.

Q And the next two sheets in this exhibit are the lost time for those delegates?

A Yes. They turned in their lost time expenses.

Q What were the race of the two men whose lost time [23.4] was here?

A Well, Herbert Brown is a black man and Horace DiDavid.

Q Mr. Cooper, prior to 1962 if the company would have denied an employee a transfer because of his test score, what could the union do about it?

A We often objected, but there wasn't much we could do.

Q Why is that?

A We didn't have any rights along those lines. We only have the rights in the contract. So we had to fight to get rights.

Q You didn't have any right to transfer between subdivisions; is that right?

A No. We could request; but it was strictly—if the company wanted to give a transfer, it could. If they didn't want to, they didn't have to.

Q What if the company gave a test for promotion within a subdivision; was that a problem the union ran into very much?

A Practical tests were no problems. Written tests I never heard of until we had the case involving two black men who bid for crane running jobs, Benny Carter and Booker Towles. They had to take the Wonderlic test. And based on the scores from the Wonderlic test [23.5] they were told that they could not be crane operators.

Q And you filed a grievance about that; is that right?

A Yes. We filed a grievance, and we fought it through the procedure.

We felt that no written test could measure a man's ability to operate a crane.

Q Union 292, is that the grievance you are referring to?

A Yes.

Q And just so I'm clear, this was the first time that you recall that written tests were used for promotions in a subdivision?

A I had never heard of it before.

Q Now, after 1962 when you won transfer rights between subdivisions, did the union try and do anything about testing, testing for transfers between subdivisions?

A We always took the position that the tests should be a practical test, that written tests weren't fair. Written tests weren't fair to people who didn't—had limited educations, who couldn't read or comprehend properly. And minority groups were—among minority groups there were a lot of people who didn't finish school.

[23.6] Even, for instance, Booker Towles is a high school graduate, Benny Carter I'm not sure he graduated but he went pretty high in school and they both failed the Wonderlic test.

Q Did the union make any proposals about testing in negotiations?

A We proposed elimination of all testing.

Q And in the course of those discussions did the union make the arguments that you have just made as to why the union was against testing?

A That is right.

Q Take a look at Union 533, if you will. Do you have that in front of you?

A Here it is.

Q Page 7 of that exhibit, the bottom paragraph where it says "Union comment," do you recall the union making comments such as reported here in negotiations?

(Pause.)

A That is right. That is what I just commented on, the fact that people with limited education had problems and they were test shy. You put a test in front of them, they tighten up.

Q What were the results of the negotiations when the union proposed elimination of testing?

A The company wouldn't agree to eliminate testing, [23.7] but I believe they did agree to go along—let's see, Big Steel formed a committee on testing. And they

agreed to go along with what came out of Big Steel with regard to testing.

Q And did the Big Steel Committee come up with language governing the use of tests?

A They had quite a time on testing, Big Steel; and whatever they got out of Big Steel we got.

Q Has the union to your knowledge endorsed the testing language that you have gotten into your contract?

A Right. We would like to go a lot further. We would like to eliminate the test. We would still like to eliminate them all.

Q Has the union endorsed the rights that you do have with respect to testing?

A We have.

Q Now, after 1962 when you got a right to transfer, did the union make any proposals to try and change the way transfers were being handled?

A Well, we weren't satisfied with what we had because you could—it wasn't everyone's knowledge, the jobs that were open. There could be openings that only a few people would know about. You know, if you had a friend in employment or a friend in another [23.8] department, he could tip you off there would be a good opening here and you could put a transfer in.

We felt the only way to handle this would be to advertise company-wide, advertise on the bulletin board so everyone could see where the openings were rather than have a request in the employment office for a transfer.

Q Do you happen to recall when the union first proposed posting after the 1962 transfer rights were negotiated?

THE COURT: Opposed or proposed?

MR. SILBERMAN: Proposed, I am sorry.

THE WITNESS: We've proposed company-wide [posting] for a long time. In fact, we would like to have had it back in 1962.

* * * *

[23.20] Q Has it ever been the union's policy or standard procedure to refuse to file or process race [23.21] discrimination grievances?

A Never.

Q In your experience what is the effect of alleging race discrimination in a grievance?

A You mean just a straight grievance on race discrimination or a grievance involving something else?

For instance, I have had a man say: "Hey, I think they are discriminating against me by not giving me a promotion."

The main thing we are after here is promotion.

Now, if we get too many issues involved, then we got two problems to settle. And unless the man has some real good information with regard to discrimination, it is difficult—it makes it more difficult to settle.

If you have the two things in there together, then the company gets their back up a little more and it is hard to settle the whole thing.

We found it is better if we say: "You have refused a man a promotional opportunity that is due him. Treat every man as a man, not as he goes to this church, that church, black or white, but treat every man as a man."

* * * *

[23.32] Q Now, in about 1941 when Lukens built a brand new building in your area with two locker rooms, they had one for whites and one for blacks, didn't they?

A That is right.

* * * *

Q Based on your recollection, aside from what you have read in the documents that Mr. Silberman showed [23.33] you yesterday, you don't recall the union ever proposing a non-discrimination clause be included in the collective bargaining agreement, do you?

A By "the union," are you referring—I think our International Union has been for this since the beginning.

Q My question is whether Local 1165 or Local 2295 ever proposed it in negotiations with Lukens?

A We proposed that we get the things that came out of Big Steel.

Q You never specifically proposed a non-discrimination clause; is that right?

A You're talking about us prior to—the '62 date there, prior to '62?

Q At any time.

A There was never anything proposed in negotiations.

• • • •

[23.36] Q Now, you also believed that foremen and other supervisors at Lukens sometimes engaged in ethnic discrimination, didn't you?

A I have suspected that there was—I said all [23.37] types of discrimination, ethnic, all types of ethnic group discrimination and religious, nationality, what not, both black and white.

Q Including racial discrimination, right?

A Right.

Q But you have never filed any grievances on the grounds of racial or ethnic discrimination, have you?

A Just a straight racial or ethnic discrimination grievance, no. I have filed grievances involving what I felt was discrimination with promotional opportunities or things like that.

And this also involves black people.

Q In this grievance on behalf of Benny Carter and Booker Towles with regard to the crane operator job, you didn't make any claim of racial discrimination there, did you?

A No, I didn't.

You know, you compound that problem, as I stated previously when I spoke to the other attorney, if you

put the racial discrimination bit in there. Then you have two cases to handle. And you have a more difficult grievance to solve.

The main thing we are after is the economics in the situation, the more money for the man, the promotional opportunity or to have something [23.38] removed from his record.

Q But that grievance wasn't won, was it?

A What is that?

Q The Booker Towles, Benny Carter grievance?

A I can't—as the gentleman over here stated, it was withdrawn there by the staff man. I don't know why. I don't think it should have been withdrawn. I thought it should have gone to arbitration.

Q You don't recall ever telling any company representative that you believed a foreman or another supervisor was discriminating on the basis of race or ethnic origin, do you?

A No.

* * * *

[23.41] Q Now, you believed that the Wonderlic test, which was the test involved in that grievance involved on cranes, that that disqualified a higher percentage of blacks than whites, didn't you?

A I think it disqualified a high percentage of anyone who has difficulty reading or writing, which would include blacks.

Q You thought that it disqualified a higher percentage of blacks—

A Very probably it did.

Q And it was discriminatory?

[23.42] A We felt it was discriminatory. We wanted it thrown out for a long time.

Q But you don't recall any discussion within the union of challenging the Wonderlic test generally on the ground that it was racially discriminatory, do you?

A We challenge on the basis that it is discriminatory and we feel that if we say it is discriminatory that in-

cludes all of us, all black and white. We are all in the same boat together.

Q Do you recall any discussion of a general grievance against the company's using the Wonderlic test on the ground that it was discriminatory?

A I can't recall.

* * * *

[23.51] LLOYD LAWRENCE, sworn.

DIRECT EXAMINATION

* * * *

Q By whom are you presently employed?

A By the International United Steel Workers.

Q And what is your position?

A I'm a Sub-district Director in the Malvern office.

Q How long have you been employed by the International Union?

A Since April of 1970.

Q What position did you hold before you were Sub-district Director?

A I was a staff representative for the United Steel Workers.

Q What is your responsibility as Sub-district [23.52] Director?

A My responsibility is service various local unions and also administer the responsibility of the Malvern sub-district.

Q Before you worked for the International Union, did you work at Lukens Steel?

A Yes.

Q Can you briefly describe your employment history at Lukens?

A I was employed as an apprentice machinist at Lukens Steel Company in April of 1942.

In July of 1942 I enlisted in the United States Navy and served in the United States Navy for five years.

Returning from the Navy I continued in my apprentice course and became a craft machinist and then worked there until I joined the United Steel Workers.

Q What was the first position you had with the Local Union at Lukens?

A I was a shop steward.

Q And in approximately what year did you become a shop steward?

A In the middle '50s.

Q And did you hold a number of offices with Local [23.53] 1165?

A Yes. I was committeeman, Chairman of the Grievance Committee, and also president of the Local.

Q What were the years when you were chairman of Grievance Committee?

A From 1962 until 1964.

Q What years were you president?

A From 1964 until 1970.

Q As between the International Union and a Local Union at any plant that the steel workers represents, which of the organizations is the bargaining rerpesentative certified by the NLRB?

A The bargaining representative is the International Union.

Q And which union, the International or the Local Union, is authorized to enter into collective bargaining?

A The International is the representative and the local staff of it.

Q What does it do?

A When contracts are negotiated they are negotiated with the International on behalf of the local union, and it is the local union's responsibility to see that these contracts are policed.

Q Does the local union have some responsibility [23.54] in the grievance procedure?

A Yes. Generally in the case at Lukens we have what we call the five-step grievance procedure. And it is

the responsibility of the local to carry the grievances through the first three steps of the grievance procedure.

Q And who handles then the fourth and fifth step?

A After a grievance once is appealed to the fourth step and to arbitration, it is the responsibility of the staff representative that services that local.

Q What is the role of the International Union's staff representative?

A The role of the International staff representative is to hear grievances in the fourth step, also to hear grievances in arbitration, to attend local unions, to see that the policies of the International are upheld and also to give the local any assistance that is necessary in servicing their members.

Q Does the staff representative have any responsibility in contract negotiations?

A Yes. Usually the staffman along with the local union negotiating committee; they are the ones that are in charge of negotiations.

Q And does the staff representative have any [23.55] role with respect to complaints by the membership about how the local union leaders are handling their responsibilities?

A Yes. From time to time—and this does happen frequently—if members are not satisfied with how some of the officers or grievance committeemen are doing their job, they do complain to the staffman and the staffman does whatever is necessary to correct the situation.

* * * *

[23.57] Q Mr. Lawrence, in which years did you participate in the negotiations at Lukens?

A I participated in 1962, '65 and '68 elections.

Q In those years, what was the relation of the bargaining at Lukens with the bargaining that is carried out by the International Union and the coordinating steel companies?

A We at 1165 were what we refer to commonly as a me-too agreement, which meant that the local union and the company had agreed to accept the economic package that the basic steel industry agreed to, and it would be implemented at a later date at the local level.

Q Other than economic issues, were there other matters negotiated at the Coordinating Committee level [23.58] that were implemented at Lukens?

A Oh, yes. Anything that was agreed to in the International package—seniority, committees, and so on and so forth—would be implemented at the local level.

Q What then is the subject of the bargaining at the local level at Lukens?

A The bargaining at the local level usually is to implement what the basic steel companies agreed to and try to correct and improve any local conditions that we have had trouble with in the previous years of the contract.

* * * *

[23.59] Q How was the Negotiating Committee selected?

A The Negotiating Committee is selected by the membership.

Q Once negotiations were underway with the company, who decided which of the company's offers would be accepted or rejected?

A The Negotiating Committee, subject to ratification by the membership.

Q During your years of active participation in Local 1165, can you describe the degree of participation by black employees in the local union meetings?

A Well, in my experience our participation at our local union meetings I always felt was above average, and when I say above average, I'm talking about attendance, and we always had a very, very good black participation in all functions of our local union.

Q Since you have become employed by the International Union, have you had an opportunity to observe membership meetings at other locals?

A Yes, I have.

Q And how does the black participation at Lukens compare to the other locals you are familiar with?

A Well, the black participation at Lukens I'm very [23.60] proud of because it's my home local union, and I think the participation there is better than any local that I'm familiar with.

Q Did the black employees also participate as officers and grievance representatives?

A Yes.

Q Can you explain the degree of that participation?

A Well, in my first term as president James Brown, who is black, was my vice-president, and Isaac Whitaker, who is black, was chairman of the Grievance Committee, and we always had several Grievance Committeemen that were black, and I can never—I can't remember ever having a slate of officers, the top five officers which one of them weren't black.

* * * *

[23.70] Q Now, turning to the specific negotiation issues [23.71] at Lukens that you participated in, can you describe what the union's position was on transfer rights based on seniority at Lukens?

A Well, we always felt that people should have a right to transfer to jobs wherever their seniority would carry them, in unlimited amounts of transfers.

Q How far back was the union holding this position?

A Oh, as far back as I can remember.

Q What was the reason that the union wanted transfer rights based on seniority?

A That was to give people promotional opportunity to get them into areas where the promotional opportunity would be greater than the area they were presently working.

[23.72] Q Does that union purpose having anything to do with racial patterns in initial assignment of employees to units?

A I'm not so sure if I understand that.

Q Were you or other union representatives aware that there were certain units at Lukens that had more blacks than others?

A Yes.

Q And others that were largely, if not entirely, white?

A Yes.

Q What did the union's position on transfer rights have to do with that situation?

A Well, we always felt that in the areas where there were an overwhelming amount of colored people or people of ethnic origin that they would like to have them transfer to units where their promotional opportunity would be enhanced.

Q In 1962 there were negotiations on the subject of transfer rights at Lukens.

Do you recall what the outcome of those was?

A That sounds like the time that we finally come to an agreement where you could have—transfer into two different areas, I believe.

[23.73] Q By that you mean a request for transfer?

A A request for transfer into two different units.

Q Were there any problems that the union encountered in the request for transfer system?

A Oh, yes. The company reluctantly gave in to our demands. Of course, our demands were much less than we would have liked to have also.

Q Once the request for transfer system was in place, were there problems that the union encountered in how it allocated opportunities to people or how that system worked?

A Well, can you be a little more specific?

Q Well, let me refer you to Exhibit Union 193, which is in a folder in front of you, Mr. Lawrence.

A Is that 193?

Q Yes. It should be very near the top.

A Oh, okay.

Q And I will direct your attention to paragraph 2 there, the second paragraph. It is not numbered.

You were present at that meeting, am I right?

A Yes.

Q Do you recall what Mr. Whitaker was referring to?

A Yes. I think what Ike was referring to that under the 60-day provision there could be some kind of [23.74] a collusion that could take place. If you were in the right place at the right time and the company wanted someone to have a job or that they thought there was an opening there for a job, they could see that that job was filled before an individual had his full 60 days in.

And if he didn't have his 60 days in, under the transfer agreement they could award it to whoever they saw fit.

And there was always the possibility that hanky-panky could take place.

Q Now, in the third paragraph of that minute, there is a description of a statement made by Mr. Gary and Mr. Scull for the company.

Do you recall such a statement being made at that meeting?

(Pause)

A I can't reply on that. I can't recall specifics.

Q Were there other problems with the transfer requests system having to do with employees being able to get information from their friends or buddies as to what openings were available?

A Yes. Well, depending on where the opening would be, the people in the area would have an advantage over somone that was isolated from that area.

[23.75] Q What, if anything, did the union propose to the company in order to deal with these problems?

A Well, we proposed plant-wide bidding for all jobs.

Q While you were at Lukens, was there any time when the company was prepared to agree to plant-wide posting?

A No.

* * * *

[23.78] Q Can you describe what the union's position was on the subject of testing?

A Generally speaking the union was always against testing. We had very basic reasons for being against testing. It was because blacks and people of ethnic origins didn't quite have the education that maybe some whites did. And they had a most difficult time in taking and comprehending written tests.

Q Did you make that position known to the company?

A In every negotiations we made it clear and in beween.

Q Did you make that position known to the company in the context of the Wonderlic test?

A Yes. We were never in favor of any kind of testing.

Q Did you make any specific statements to the company about your position on the Wonderlic test?

A I can't be specific, but I know that there were many times during the grievance procedure when grievances were being pursued on the basis of people [23.79] being denied jobs because of taking the Wonderlic tests that we voiced our disapproval of it.

Q Exhibit P-15 there in your folder, do you have a copy of it there?

I would like to direct your attention to the second page of that exhibit, paragraph numbered 7A.

A Yes.

Q You signed that agreement, did you not?

A Yes.

Q Did you understand that by agreeing to that the union was giving up its right to grieve over the use of tests for entry into these craft jobs?

A Of course not.

Q Or that it was giving up its right to grieve over the Wonderlic test?

A Of course not.

Q What was the union's position on the subject of whether black employees should have access to get into craft jobs?

A Our position was that we wanted everybody to be treated equally, whether they were black or white or what religion they came from. We wanted everybody to have equal opportunity to the highest promotion that they could get at Lukens Steel Company.

* * * *

[23.84] Q In the 1962 negotiations was the union opposed to including a non-discrimination clause?

A The union in 1962 was and never will be against discrimination of any kind.

[23.85] THE COURT: I don't think you mean that. It is the reverse of what you mean, you will never be against discrimination.

THE WITNESS: We will never be for discrimination.

BY MS. CLARK:

Q What about a non-discrimination clause in an agreement?

A We weren't againt it.

Q Did anyone for the company in the '62 negotiations express any opposition to putting a non-discrimination clause into the agreement?

A No; I don't recall that.

Q If no one was opposed, why then was the clause left out of the Lukens agreement?

A I don't know why. I guess because of the haste of negotiations or an oversight or whatever, but I don't know of any reason it was purposely overlooked.

Q In your experience in negotiating contracts since you have become a representative for the International Union, have you negotiated a number of contracts elsewhere?

A Yes.

Q In your experience it is common or uncommon in the haste to make a settlement you leave a provision [23.86] out of an agreement?

A Even in areas where there is no haste, even sometimes after we proofread the contract we find out that things have been inadvertently left out.

Q And that would include things that are noncontroversial?

A Yes.

Q Mr. Lawrence, are you familiar with any of the facts surrounding the West Side locker rooms when those —when the new locker room facility was opened?

A Generally.

Q Do you recall what the union's position was on the desegregation of those facilities?

A Yes. We wanted them to go desegregate as fast as possible.

Q Do you know whether that position was made known to the company?

A Yes, it was.

Q Did the union do anything at all that would stand in the way or delay the desegregation of those facilities?

A Absolutely not.

* * * *

[23.89] Q There was some testimony in this case that between 1962 and 1965 employees were given pool [23.90] assignments on layoff that were less favorable than pool assignments given to other employees who were also laid off.

Can you tell us whether there was any right in the 1962 contract for a senior man to get the more preferable pool job when he was laid off?

A There were no rights.

Q Was there any right at all for the senior man to select his pool job?

A No.

Q Did you receive complaints about this problem from employees within the local union?

A Frequently.

Q And what was the race of those employees who complained?

A Both black and white.

Q Were there any subsequent negotiations addressed to this [problem]?

A Yes.

Q Do you recall what those were?

A Well, at a later date we improved the pool system and subdivided the pools into what we call puddles.

Q Within those puddles were there some rights of assignment?

[23.91] A Yes. The reason for creating the puddles was to give people a right to bid on the higher jobs on a seniority basis.

Q Did they actually bid on the jobs?

A No. They claimed the jobs. I'm sorry.

* * * *

[23.109] Q You may want to look at Union 432, Mr. Lawrence, which lists Carl Cannon as one of the appointees you [23.110] named to a Civil Rights Committee in 1965.

Were you aware at that time that Mr. Cannon had served as a member of a committee of black employees from the pits which had gone to John Muhs to complain about segregated facilities in the plant?

A I'm still trying to hunt 432. I found it.

Q You don't really need the document to answer the question.

Were you aware at that time that Mr. Cannon had served as a member of a committee which had been made up of black employees from the pits which had gone to John Muhs to complain about segregated facilities?

A I'm not aware of that.

Q Were you aware of the existence of the committee?

A No, I don't recall the committee.

Q Did you know that any group of black employees had complained to management about segregated facilities?

A No, I couldn't say that I do.

Q The union never filed any grievance concerning segregated facilities, did it?

A I don't know if the union ever did. I never did [23.111] personally.

Q While you were president, wouldn't you have known if the union had filed a grievance complaining of segregated facilities?

A Not necessarily.

Q You would have known if it had been a group grievance signed by the union itself, wouldn't you?

A Not necessarily.

[23.112] Q From your years as president from '64 to '70, you don't know of any grievances filed by the union complaining of race discrimination at Lukens, do you?

A I don't remember personally, no; but I am sure that there were discrimination grievances filed.

Q You did know while you were at Lukens, didn't you, that there were some subdivisions that were segregated, some that were black, some that were white?

A I don't recall any subdivisions being segregated.

Q I show you a document, Mr. Lawrence, marked [P-1101], which is a memorandum supposedly minutes of Civil Rights Committee meeting of April 11, 1969, indicating that you were present at that meeting.

I will let you read this and ask you if this refreshes your memory as to whether there were segregated subdivisions. (Handing witness.)

* * * *

Q You were a member of the Civil Rights Committee [23.113] at Lukens in 1969; is that so?

A That is correct.

Q And you were present at that meeting in April of 1969?

A Well, my name is as the union representative, I imagine I was.

Q That would indicate that you were present?

A Yes.

Q And at that meeting company management indicated to the members of the Committee that they had been requested by the OFCC to do something about seven of the segregated subdivision units; is that so?

A Pertaining to what?

Q Did that happen or didn't it?

A Segregated pertaining to what?

Q Race, racially segregated units.

A What did they want desegregated, washrooms, the job opportunities, their lockers or what? What did they want desegregated?

Q The memorandum indicates OFCC had requested that something be done about the racially segregated subdivisions. That is what the company management people at the meeting stated to the members of the committee at that time, isn't it?

[23.114] A I have no knowledge of any segregated subdivisions at Lukens when I was there. I have no knowledge of that.

Q Do you have any memory of that occurring at a Civil Rights Committee meeting?

A No.

Q Nobody from management ever said that at one of these Civil Rights Committee meetings?

A They could have. I don't recall them saying that.

Q And if they had said it you would have pointed out there were no segregated units; is that right?

A When I say there were no segregated subdivisions, I say there were no segregated subdivisions as far as any blacks being discriminated against because of lay-offs, demotions or whatever.

And if 1165 was aware of any segregated subdivisions that blacks or any other minority people was being denied opportunities, we would have done something about it.

THE COURT: It is two different questions. She is using the term "segregated subdivisions" as I understand it to be a subdivision in which there were no blacks.

MS. GARTRELL: That is correct or one [23.115] in which there were no whites.

THE COURT: Right. And the question is at the Civil Rights meeting somebody from management said that the OFCC was concerned about the fact that there were subdivisions with all of one race in it and they wanted something done about it.

THE WITNESS: They could have.

THE COURT: Okay.

THE WITNESS: They could have.

BY MS. GARTRELL:

Q But you have no memory one way or the other?

A No.

Q There came a time when the trades and crafts job classifications were raised by two classifications across the board, is that so?

At the time that that occurred, was it your understanding that the company was also going to raise the scores required on the Wonderlic for employees to get into those trades and craft subdivisions?

A I'm not aware of it.

Q The company never told you that they were going to raise the Wonderlic score requirements for employees applying for the trades and craft subdivisions?

A They may have. I don't recall.

[23.116] Q Neither you nor Local 1165 or in the person of anyone else as far as you know ever investigated whether or not the Wonderlic was a valid predictor of job success, did you?

A We never did any detailed research, but we always opposed the Wonderlic test and any other test.

Q But you never investigated whether or not it was a valid predictor of job success, is that so?

A No. I don't think that we ever did.

* * * *

REDIRECT EXAMINATION

BY MS. CLARK:

Q Mr. Lawrence, did the union to your knowledge ever undertake validation studies of tests anyway?

A Yes. I remember this vaguely. Prior to the strand cast being installed at Lukens Steel Company I think the local did some kind of research, and I think we even called in our expert Frank Lunney. And [23.117] I think there were communications back and forth with the local, Mr. Lunney and our International office regarding the testing procedure for employees being put into the Strand Cast Subdivision.

* * * *

[23.120] DONALD Y. SMITH, sworn.

DIRECT EXAMINATION

BY MR. SILBERMAN:

Q Mr. Smith, you are currently employed by Lukens; is that correct?

A Yes, I am.

Q You are a shop steward in Local 1165?; is that right?

A Yes.

Q Do you hold any other position in the local?

A No.

Q Mr. Smith, Reverend Mobley testified concerning an incident—concerning his schedule in which you were involved. Have you had an opportunity to read over Reverend Mobley's testimony?

A Yes, I have.

Q Do you recall the incident in question?

A Yes.

Q Tell the Court what happened.

A We were both scheduled to grind in nickel clad. At 4:30 the schedule came out, and we both looked at the schedule. And around—I guess it was 3:30 the schedules come out, a quarter to 4:00—

[23.121] THE COURT: Excuse me, you're mumbling. It will be hard for people to understand what you are saying, sir.

BY MR. SILBERMAN:

Q You said 4:30 the schedules came out?

A 3:30, quarter of 4:00, when we were getting ready to quit our shift a clerk came out and told me my schedule was changed to plasma cutter. He said: "Okay, make sure you finish with the nickel clad."

Q Now, did you ask to have that change made?

A No, I did not.

Q Did Reverend Mobley have more or less subdivisional time?

A Ten years more.

Q Why wasn't he given a plasma cutter job?

A He wasn't qualified.

Q What else happened in this incident?

A Well, Jim came to me and said: "If you can get your schedule changed, get mine changed."

Q Jim is Jim Mobley?

A I went to look at the schedules, the bulletin board; and I looked at the jobs I knew he did. And they were all filled with senior men. So I told him what I saw. He said: "Well, can't I still get any other job that I know?" [23.122] I went and I talked to supervision, and they said he had all 2's and he would have to wait seven days.

Q When you say he had all 2's, when you put in a preference under computer schedules these were two jobs?

A Not preference; he didn't want them.

Q Non-preferred?

A Non-preferred.

Q On every job which Reverend Mobley put in for a preference the people holding that job that work week were senior to him; is that right?

A Yes.

Q Was it your conclusion that he was properly scheduled?

A Yes.

Q Did you report back to him that conclusion?

A I come back and told him and I said, "I can't do nothing for you?" He said: "Well, you got your schedule changed." He was mad. I couldn't do nothing about it.

Q Did Reverend Mobley's race have anything to do with the way you handled this incident?

A No.

* * * *

[23.167] BEN ELLIOTT, sworn.

DIRECT EXAMINATION

BY MR. SILBERMAN:

Q Mr. Elliott, you are employed by Lukens; is that right?

A That's true.

Q What subdivision do you work in?

A Engineer, transportation and service.

Q Engineer subdivision of the Transportation Department; is that right?

A Correct.

Q How long have you been in that subdivision?

A Since 1959.

Q Are the engineers in—what zone are the engineers in for grievance purposes?

A Zone seven.

Q What job did you hold before you were an engineer?

A I worked as a trackman and as a laborer.

Q How about a conductor? Were you ever a conductor?

[23.168] A Yes.

Q Conductors and trackmen are in Zone Seven, too?

A Yes.

Q You were elected an assistant Grievance Committeeman in 1974; is that right?

A That's true.

Q Then in March 1975, when Jim Brown became the chairman, you moved up to be committeeman from Zone Seven; is that right?

A That's right.

Q You were reelected as assistant committeeman in 1976; is that right?

A That's correct.

Q And when Jim Brown was elected as chairman, you again moved up to the committeeman for Zone Seven; is that right?

A That's right.

Q You held that until 1979?

A That's true.

Q And you are presently the Assistant Committeeman for Zone Seven?

A Yes.

Q Were you on the Negotiating Committee in 1977?
A Yes.

* * * *

[23.182] Q Are you aware at any time since you have been employed at Lukens of any racial discrimination by the company against any of its hourly black workers?

A Yes, yes.

Q And what is your awareness of that discrimination?

A My awareness of that discrimination in job assignment.

Q Now, when you say "job assignment," do you include in that transfers and promotions after an employee comes into the company?

MR. KLUGHEIT: Your Honor, I'm going to object to leading questions in this area. I think [23.183] it is outside the scope, and Mr. Elliott is a member of the plaintiff class. I really think this should be done as direct.

THE COURT: Overruled. This is cross-examination.

MR. KLUGHEIT: Your Honor, I just do want to note this is not in the scope of direct examination.

THE COURT: I don't really care what you think. I have ruled.

MS. GARTRELL: Read back the question, please, Mr. Richardson.

(The following question was read aloud by the reporter:

"Question: When you say 'job assignment,' do you include in that transfers and promotions after an employee comes into the company?")

THE WITNESS: I'm only specifying jobs in my department for an example such as track people.

BY MS. GARTRELL:

Q Well, are you including not just the first job that an employee gets when he is hired but jobs that he may get?

A Well, if you want to go into that, I can say [23.184] yes because I was one of the victims.

Q You mean you were discriminatorily placed when you were hired?

A Yes.

Q What job did you want and what job did you get?

A If I'm not mistaken, I applied for a crane runner job and I received a laborer.

Q In addition to that discrimination, have you observed other discrimination against other black employees?

A Yes.

Q And does that include the discrimination in placement, transfers and promotions after they are initially hired?

A Yes.

Q Has that happened to you personally?

A No.

Q Have you observed that not only in your department but in other departments within your zone?

A I have seen it; but I can't put my hands on it, how it came about, yes.

Q At any time that you have seen it, have you or any other union representative filed a grievance claiming discrimination as to that particular incident [23.185] that you saw?

A No. As I said before, I didn't know how it came about.

Q You mean you didn't know who was responsible for it?

A Correct.

Q And did you make an investigation to find out who was responsible for those incidents that you were aware of?

A No, I didn't.

* * * *

[23.187] REDIRECT EXAMINATION

* * * *

Q Was there ever a time when a black employee came to you as a grievance man for assistance with a complaint of racial discrimination and you didn't do anything about that complaint?

A No.

Q You always would investigate and follow up?

A Always.

* * * *

MICHAEL J. KERETZMAN, sworn.

[23.188] DIRECT EXAMINATION

BY MR. SILBERMAN:

Q Mr. Keretszman, you're employed by Lukens; is that right?

A Yes.

Q When did you start work?

A April 9, 1973.

* * * *

[23.196] Q You were a member of the apprentice committee; is that right?

A Yes; I'm a member.

Q You were appointed by Mr. Pilotti?

A Yes, I was.

* * * *

[23.196] Q Are you Chairman of the Apprentice Committee?

A No, sir. There is no chairman.

Q Now, just so we are clear, the Apprentice [23.196-A] Committee has union members and company members?

A Three union members and three company members.

* * * *

[23.197] Q When did the apprentice committee start meeting?

A I think our first meeting was in August sometime.

Q Has any question or issue arisen in the meetings of the apprentice committee concerning the company's use of tests?

A Yes, there has been.

Q Will you tell the Court about that issue?

A We requested to the company several times to see the entrance tests prior to going into the core program, at which time after great deliberation with the company, the company agreed to let us see the entrance tests.

At one of the apprenticeship meetings, they presented us with the entrance tests, let us review them, and they explained to us how the testing was done, at which time we protested and argued about certain questions on the test not being—I should say being of algebra and geometry background and of that nature, and the company assured us that it wasn't.

They said that it was taught in school, everyone in school was taught that type of math. And I on behalf of the apprenticeship committee argued that it wasn't, that you could go all the way through school without having any type of geometry or algebra.

Q Were you able to persuade the company that the [23.198] tests should be changed?

A No, we were not.

Q Was the company able to persuade the union that the test was a good test and should be kept?

A No.

Q You reached impasse on that?

A That's correct.

Q Was any question raised at that meeting about the impact of the test, particularly on black employees?

A The question was brought up about whether more blacks than whites were failing the test, and at which time Chuck Berline said no. And we also brought up the

question whether youth versus age, which I should point out that we were concerned about men being out of school 10, 15 years, how they were doing in a test, at which time Chuck Berline made the statement that the men who were out of school longer seemed to do better than the men who were straight out of school.

Q Is your understanding that a grievance is pending about this test that you saw?

A I have been told.

* * * *

[24.3] CHARLES WITTE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SILBERMAN:

Q Mr. Witte, you are the president of Local 2295, Steel Workers Union?

A Yes, I am.

Q You have been president since 1967; is that right?

A I have.

* * * *

[24.14] Q Now, Mr. Samuel Baxter, I believe it was, testified concerning a complaint that he was not getting to do stainless welding.

Let me first ask, did you ever do stainless welding?

A Yes, I have.

* * * *

[24.15] Q How would you compare the desirability of the stainless welding job to the welding on carbon steel?

A There's no difference, as far as one job's no more desirable than the other.

Q Was a stainless job any cleaner or dirtier than the carbon job?

A No.

Q Did it pay any different?

A No.

Q Did Mr. Baxter ever complain to you about not being permitted to do stainless welding?

A No.

Q When would you say that the stainless welding program ended welded products?

A In the early sixties.

* * * *

[24.33] FRANK MONT, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SILBERMAN:

Q Mr. Mont, by whom are you employed?

A United Steel Workers of America.

Q What's your position?

A I'm director of the civil rights department.

Q Would you briefly review your—that's of International Union?

A That's right.

* * * *

[24.40] Q Now, prior to becoming—when you were on the District 7 staff, in the District 7 office, did you have some familiarity with the civil rights structure?

A Yes.

Q Would you briefly describe that structure for me, please?

A Well, in 1966, it was mandated that each district establish within that district a civil rights coordinator and there was a civil rights coordinator established in District 7.

I had quite a bit of contact with that civil rights coordinator. Periodically they would have civil rights conferences and seminars, where they would have the local union people come in and this would be our educational training for those people, in order for them to be equipped with handling civil rights problems.

He also used to have occasions to speak to the staff at staff meetings and, customarily, would give some type of report at our annual district conference.

Q Did the civil rights coordinator have any role with respect to complaints from local union members in the district?

[24.41] A Yes, he would receive complaints from members within the district. He also had a responsibility to educate the staff and assist them in investigations of allegations of discrimination.

He had a role also to play as a representative of the district director, to see that each local union establish within that local union a civil rights committee.

Q When the civil rights coordinator received complaints, what would he do?

A Normally, he would contact service and staff representative and either they would decide between them—he would come out and conduct the investigation or the service and staff representative would conduct the investigation and after the investigation was completed, if it was not conducted by the coordinator, the service and staff representative had to give the coordinator a report, and then the coordinator would make a determination based on the report.

Q I should have asked you, were you civil rights coordinator for a period of time?

A Yes, I was.

Q When was that, in District 7?

A Yes, in District 7.

Q When was that?

[24.42] A I became the coordinator, I believe, in 1977.

* * * *

[24.47] Q Let me ask you to take a look at the document that's—what previously had been marked as Plaintiffs' 932.

Do you have that in front of you?

A Yes, I do.

Q Did you receive a copy of that letter, which is the front page of that exhibit?

A Yes, I did. Actually, it wasn't sent to me, but I was given a copy.

Q How did it happen to come to you?

A I was given a copy of this letter by director James M. Magee, a director of District Seven.

Q Do you know why he gave you this?

A Yes, he said—also, vice-president of Human Affairs, [Leon Lynch], and they wanted me to go [24.48] and investigate the human affairs.

Q What position were you holding at this time?

A I was Civil Rights Coordinator. I was holding quite a few positions. I guess you would say, I was sort of like an assistant to the director.

Q After you received the letter, what did you do?

A I tried to establish a meeting.

Q How did you go about doing that?

A I tried to get in contact with the writer of the letter, Brother Leon Whitfield.

Q And what happened?

A I failed to make contact with him.

Q Did you have anybody else from the district office also trying to get in contact with him?

A Yes, I do remember there was a secretary who still works for the district office, Pearl Jones. On several occasions, I had her call a set of numbers that we had received trying to reach Brother Whitfield.

Q And I take it you were unsuccessful?

A I was unsuccessful in doing that.

Q So what did you do?

A Then I wrote to Brother Whitfield.

Q Take a look at the next to the third from the last page of Plaintiffs' 932.

Is that the letter that you wrote?

[24.49] A Yes, this is the letter that I wrote.

Q Now, prior to writing that letter, had you had—had you been able to reach Mr. Whitfield on the phone?

A No, I hadn't. I had two numbers and the two numbers are right there in the letter. One number I got no response from at all. The other number they kept saying they don't know who he is.

Q After you wrote this letter, what happened?

A Mr. Whitfield got in contact with me.

Q And what did you do?

A Then I told him I wanted to have a meeting and I wanted to set up a date for the meeting and things of that nature, and he said okay.

Q Where was the meeting initially set up?

A The Malvern Subdistrict Office.

Q Was there—did you initially set it up in the Philadelphia District Office and then change it?

A No, I didn't.

Q Why did you set the meeting up for Malvern?

A It was more convenient for those who were going to participate because at that meeting I wanted to have the president of the local union—I wanted to have the vice-president of the local union who was also chairman of the Grievance Committee. I also [24.50] wanted to have the staff representative who was assigned to the local union.

Now, the staff representative worked out of the Malvern Subdistrict Office, plus the plant was located near the Malvern Subdistrict Office.

Mr. [Whitfield] worked out in that area, so it was simpler for me to just go out there, rather than have everybody else come to Philadelphia for my convenience.

Q Why didn't you have the meeting at the local union hall?

A I felt possibly Mr. [Whitfield] would feel intimidated by it.

I would rather take the meeting away from the local union hall, so he would feel more at ease, so to say, to put it in a neutral setting; the Malvern Subdistrict Office is our office.

Q When you say, "our office—"

A The International's office.

If we went into a local union hall, they would have possibly people who would be around the hall and possibly could get involved, so I wanted to take it completely out of that setting and put it in a setting that he would feel as free as possible to discuss what was bothering him.

[24.51] Q Was this the standard procedure that you followed in handling complaints?

A Yes, as much as possible. I always tried to take it in a subdistrict office.

Q Now, what happened? Did you actually hold the meeting with Mr. Whitfield and other individuals?

A Yes, we did.

Q What took place at that meeting?

A Well, Mr. Whitfield was present. He also came with another member of the union, Mr. Brewer, president of the local union, Benny Pilotti, vice-president and chairman, James Brown were present.

We had two staff representatives who were present, [Horsey] Zitarelli, who was recovering a—

Q Earl Zitarelli?

A Yes. And we also had Burt Howe present, who was assigned in Earl's absence, and I was also present.

Q What was the major issue or complaint that Mr. Whitfield raised at that meeting?

A Well, Mr. Whitfield raised a question concerning some duties of truck washing and he felt that—well, these duties were properly assigned to people and things of this nature. When I first started getting involved with Mr. Whitfield on this, I felt possibly there [24.52] was a question there of discrimination, that here we have a situation where they were forcing black employees to do something that white employees were not required to do.

Q Why did it matter to you whether there was discrimination or something other than discrimination?

A Well, one of my concerns was being a Civil Rights Coordinator and the question coming from a black employee, that naturally I wanted to look to this issue to see if something was going on there in a discriminatory manner and that we wanted to get at it right away because they're one of my overriding responsibilities, being a coordinator, to look for areas of discrimination and to try to do something about it.

[24.53] Q And what did you—through your conversation with Mr. Whitfield, what did you conclude about this particular matter?

A What had happened in this particular matter was duties that were described within the job description, there were understandings reached by the local union people and their elected representative and management concerning these duties, and it was not a situation where black employees were being compelled to do something that white employees weren't. All employees either had this opportunity or didn't have the opportunity. Race didn't enter into it at all.

So then I made the determination that this then came under the enforcement of the collective bargaining agreement, and if there was anything wrong with it, then it should go through the normal grievance procedure.

Then it got into the area of the staff representatives. That's their primary responsibility.

Q If you had concluded that this was in fact a case of racial discrimination, would you have responded any differently?

A Yes, quite differently because I feel that as a district civil rights coordinator that my authority [24.54] superseded that of staff representatives, and then I should then get personally involved my own self, and it's just not a question of enforcement of the collective bargaining agreement.

Q After you decided this was not a discrimination matter, what did you tell Mr. Whitfield about this matter?

A That the matter should be taken up with either his local representatives or should be taken up with staff representative who had been assigned to services of the local union.

Q Mr. Whitfield raise any other issue that you recall at that meeting?

A Well, there was also another issue which concerned a crane operation or something similar to that. I believe this is one of the things that Mr. Brewer was talking about, but the determination was made in that area it was not a question of race; it was a question of enforcement of the collective bargaining agreement.

I informed him similarly that this is a matter that should be handled through their local representatives and also with the staff representative.

But prior to leaving the meeting Mr. Whitfield raised several other issues.

One of the issues was concerning a test. [24.55] He had a relative who had applied for a promotional opportunity, but in order to secure the job he had to take a test.

He went in and he took the test and he failed the test. He was retested by the company. He failed the second test. Mr. Whitfield was quite disturbed about this, because he had informed me that this individual had a lot of formal education and he could see no way with his educational background that this relative of his could have failed the test.

I became quite concerned about this because the relative was black and I thought possibly once again there was an area where something was happening to an individual possibly because he was black.

I requested the chairman of the grievance committee to contact the company and investigate this whole testing matter, and I also told him that I wanted him to report back to me and Mr. Whitfield the results of that investigation.

Q The chairman of the grievance committee, who would that be?

A James Brown.

Q Now, at this meeting was there any discussion about alleged inadequacies on the part of the local [24.56] leadership?

A Yes. Mr. Whitfield made charges against—made accusations against the leadership of the local union.

Basically, what he was saying is that they did not run the local union properly, they didn't conduct the meetings properly, they were not adequate in the defense of people and things of this nature.

I responded to Mr. Whitfield saying that they were the duly elected representatives of the people and that as long as there was a representative according to our election procedures and manuals, that they have to hold their office, and if he felt that they were not going on their responsibilities in a form or fashion that's dictated by our constitution, then he could bring charges in the proper form, or failing that, if he thought there was questions of impropriety going on there, then he has recourse to the staff representative.

Each local is assigned a staff representative. That staff representative's responsibilities include attending the local union membership meeting, plus every staff representative works out of an office.

There's normally a phone and a secretary there. So if you want to have access to the staff [24.57] representative, you either could do it at the membership meeting or you could either make a call to that office.

Now, he's not always in that office, but there is normally somebody in there to take messages.

Q You explained all this to Mr. Whitfield and Mr. Brewer at the meeting; is that right?

A Yes, I explained that to him and also told him if he felt he had not been properly satisfied with his complaints by the staff representative that the established policy in this district was that he has the right to go to his subdistrict director and also bring forth his

complaints concerning the operation of his local union or his staff representative with the subdistrict director, and if he feels he is still not satisfied, then he has recourse to come to the district office and to make an appointment with the district director, and I assured him that his allegations would be investigated.

Q Mr. Whitfield testified at your meeting with him you told him that if he was raising matters relating to civil rights or discrimination you wouldn't hear it or didn't want to get involved.

MS. GARTRELL: Objection, your Honor. That is not an accurate statement of the testimony.

[24.58] THE COURT: Well, we will find out from the witness what happened.

BY MR. SILBERMAN:

Q Did you say anything like that?

A I don't recall ever being—I think there's no truth in that statement, because I know, because of my responsibilities as a civil rights coordinator, and because of my interest in this area anyway, that one of the things I always would be sensitive to and always be responsive to is any areas that relates to discrimination.

THE COURT: You have answered the question. What is the next question?

BY MR. SILBERMAN:

Q Have you ever told any employee, any union member that you would not listen to civil rights or discrimination matters?

A Never.

* * * *

[24.64] CROSS-EXAMINATION

Q At this meeting that you had with Mr. Whitfield and Mr. Brewer, wasn't one of the complaints then Mr. Whitfield and Mr. Brewer had that the representation of their local union was not at that moment adequately representing a group of black laborers whose jobs were being changed by the company against their will?

A Yes, I think I recall that, yes.

Q Do you recall the term supra laborer being used at that meeting?

A No, I don't.

Q Do you recall Mr. Whitfield and Mr. Brewer complaining that the company was changing the duties of the jobs of these black men and it was going to result in elimination of jobs which were held by black men, and that this violated the contract?

A My recollection of the explanation that I received was—I think you are referring to the duties of truck washer?

Q No, I'm not.

A Then I don't recall specifically what you are talking about.

Q Do you remember what job Mr. Brewer said he held [24.65] at Lukens?

A I believe at the time of the meeting I think he was a crane operator.

Q Do you remember what department he was in?

A No, I don't.

Q You don't remember anything at all about a complaint that the union representatives were selling these black guys down the river, these men who had labor jobs, whose jobs were being redesigned and redefined between contracts? You have no memory of that?

A I remember—I don't remember it being referred to as black guys. I remember that there was a question of about some jobs that were being redefined. It was my understanding that an understanding had been reached by the local people in that area, along with their elected representatives, to take certain duties or something, that they either had the right to agree to do it or not agree to do it, but it was something that was reached after a considerable amount of discussion.

Jim Brown said that he was aware of it, that he had participated in it, and that if my recollection serves me

correctly, that it was voted on by the people in that area, and this was the outcome.

Q Who told you it was voted on?

[24.66] A Jimmy Brown.

Q Wasn't it the claim of Mr. Whitfield and Mr. Brewer that the representation over that issue had been totally inadequate and in fact had been a breach of duty to black members of Local 1165?

A I don't recall him saying it was a breach of duty as relates to black members of Local 1165. He questioned what was going on, and he had strong feelings about the fairness of it.

* * * *

[24.69] Q You did perceive Mr. Whitfield's complaint as a civil rights complaint, didn't you?

A When I first got involved in the complaint, I didn't know what it was. He wrote concerning some operations—he wrote concerning the operation of the local union and his officers, and he asked somebody to come in and investigate them, and when I went out there I didn't know what the problem was until we sat in the room and he started then divulging to us what was concerning him.

Q You didn't talk about it on the phone before the meeting?

A No, I didn't.

Q After that meeting, you didn't have any doubt that he was making a civil rights type complaint, did you?

A Certain aspects of it—that aspect of the test concerned me.

Q And the only response you ever got from Local 1165 concerning the test aspect, which you did find out that this employee had flunked, that indeed his test had been graded properly; is that right?

A That's right.

* * * *

[24.70] REDIRECT EXAMINATION BY MR. SILBERMAN:

Q What was the allegation that Mr. Whitfield was making with respect to the test?

A That he felt that this individual had not been graded properly and he felt that it was possibly because he was black.

Q Did he suggest to you that the test itself was a bad test or an unfair test?

A No, he did not.

* * * *

[24.72] THOMAS JAMES, sworn.

DIRECT EXAMINATION

BY MR. SILBERMAN:

Q Mr. James, you're employed by Lukens; is that correct?

A Yes.

Q When did you start working?

A December 8, 1967.

Q And where were you first assigned?

A On what we call the west side.

Q Is that where you still work?

[24.73] A Yes, that's where I still work.

Q You became an assistant Grievance Committeeman in June of 1975; is that right?

A Yes.

Q You were elected as committeeman in 1976?

A Yes.

Q You were reelected in April of '79?

A Yes.

Q And you became a chairman of the Grievance Committee in October of '79; is that right?

A Yes.

* * * *

[24.83] Q Take a look at Union 653, if you will.

You have that in front of you?

A Yes.

Q Do you recall this complaint?

A Yes.

Q Now, the copies are not very good.

Let me ask you, am I correct in saying that it states, denied equal opportunity to work overtime on his bidded job?

A Yes.

Q What was the nature of the complaint—did you talk to Mr. Young about this situation?

A Yes.

Q What was the nature of the complaint that he brought to your attention?

A He was complaining that he was not getting the overtime on the job in which he was working. He was saying that the foreman was illegally soliciting the other employees to work in that area, work in his area on his job, and that was the nature of his complaint [24.84] at the time.

Q Did he make any complaint that he was—the amount of overtime that he was receiving was less than the amount of other employees?

A No.

Q Get any complaint about the financial loss that he was suffering?

A No.

Q What did you do with this complaint?

A Well, I filed the 520 form and—

Q That's the first page?

A Yes. I filed this form here and we—in our civil rights meeting, we voted—brought it to the company's attention and we had a joint investigation on it. We went to his department. We checked the overtime list and we found that he had not been working, had not been solicit[ed in] his department.

At the time we met, the foreman was guilty of improperly soliciting and he was already transferred to another area, so we got a promise from the company that it would be a cease and desist of the practice and that the foreman wouldn't solicit the overtime himself.

He would go to the Crane Department and have the Crane Department solicit the overtime, [24.85] like they should have been.

Q Was Mr. Young present for any of the meetings that you held in this?

A He was present at this meeting.

Q And did he say anything to indicate how he felt about the resolution?

A Well, it's my understanding that it was settled to the satisfaction of both parties.

* * * * *

[24.99] Q Looking at May 31, 1978, the minutes of the civil rights committee, the first paragraph there, paragraph numbered 1, union agreed to provide statistics to substantiate its claim of disproportionate discharges at a subsequent meeting of the committee.

Has the union ever come up with those statistics?

[24.100] A No, not that I recall.

* * * *

[24.106] Q Do you recall whether any grievances have been filed against discharges of probationary employees in their first 60 days with the company, on the grounds that it was discriminatory?

A We don't file grievances for probationary employees.

Q Are you aware of Article 11(i) of the 1977 agreement? I think there was a parallel provision in the 1974 agreement, which says: "New employees and those hired after break in continuity of service, will be regarded as probationary employees for the 520 hours of actual work, and will receive no continuous service credit during such period. During such period, probationary employees may

be laid off or discharged, as exclusively determined by the company. This provision will not be used for purposes of discrimination because of race, color, creed, national origin, or sex, or because of membership in the union."

[24.107] Q Were you aware of that provision?

A Yes.

Q You haven't filed any grievances under that; is that right?

A Not under the probationary—the 520 hours.

* * * *

REDIRECT EXAMINATION

BY MR. SILBERMAN:

Q Did any probationary employee ever come to you and ask you to file a grievance under the discharge, such as the portion that Mr. Ewing just read?

A There have been people to come to us, but as new hires we have no jurisdiction under this.

* * * *

[24.108] DEE GILLIAM, sworn.

* * * *

[24.109] DIRECT EXAMINATION

BY MS. CLARK:

Q Mr. Gilliam, what is your position?

A I'm director of the Arbitration Department for the United Steel Workers.

Q That's the International Union?

A Yes.

Q How long have you held that position?

A Since 1975, January 1st.

Q What position did you hold immediately before that?

A I was the Assistant Director of the Contract Administration Department.

Q Is that the same department as the Arbitration Department?

A Yes, the Contract Administration Department was divided on January 1, 1975, into the Wage Division in the Arbitration Department.

Q Before you were Assistant Director in the [24.110] Contract Administration, what was your position?

A I was a technican in the Contract Administration Department.

Q When did you come to the International Union?

A January 1, 1967.

Q Prior to that, where were you employed?

A I was a staff representative in District 32, which was headquartered in Milwaukee, Wisconsin, for five years.

Q And before you were employed as a staff representative, did you have some experience with the steel workers local union?

A I was a local union officer for fourteen and a half years.

Q What was the highest office that you held in your local union?

A I was president of the local union for three terms, about five years and a half.

Q Would you describe briefly the functions of the Arbitration Department?

A The Arbitration Department advised technical service to our various districts upon request from a district director.

We handled some of the more complicated arbitration cases; we're involved in national [24.111] negotiations in the basic steel industry, aluminum industry, canning industry and many of our fabricating contracts.

We participate in educational seminars. We digest and send out copies of our arbitration decisions.

We publish a monthly news letter on arbitration, and an arbitration bulletin.

We public a steel workers handbook on arbitration and we handle almost any problem of a contractual nature that's not handled by one of our departments, such as the Pension and Insurance Department or the Wage Division.

Q Do you have a special interest in the subject of testing?

A Yes, I do.

Q Could you explain very briefly how you became interested in that subject?

A Well, when I worked in the plant, I worked for Fairbanks-Marston, a department in Wisconsin. It was a plant with approximately 4600 people in the bargaining unit, approximately 900 of them were blacks.

We were all working in the brass foundry or the iron foundry. I asked to become an apprentice and I was given a battery of tests and [24.112] told that I failed and shortly after that, I enrolled in White College at night. I took some courses in industrial psychology and later found out that I had not failed the tests, I had in fact passed it and it had peaked my interest in that area.

Q Other than the industrial relations or industrial psychology courses that you just referred to, have you had any other training on the training of testing?

A Yes. I participated in the national seminar on tests at the University of Iowa in 1967, put on by the AFL-CIO.

I was back the following year as one of the instructors.

I have participated as an instructor at at least five or six seminars for the AFL-CIO since that time.

Q Have you had any training at Oxford University?

A Yes, I was awarded the John R. Mitchell Scholarship by the Canadian Steel Workers Union. I studied at Oxford for a while and I did some work in the area.

[24.113] Q Since you have been employed in the International Union headquarters, what work have you done on the subject of testing?

A Well, I served on the testing committee which was set up in the 1965 agreement, and I have participated in the negotiation of the testing language and all the basic steel contracts since 1967.

Q Is there anyone on your staff who has a background in testing?

A. Yes. I hired a young lady named Patty Seehafer approximately two years and a half ago. Patty is from the University of Wisconsin and majored in industrial psychology.

Q Between yourself and your staff, approximately how many testing cases do you handle in arbitration in a year?

A I'd say roughly about a dozen cases or so.

Q Are there others that you offer advice on, to staff representatives on?

A Yes, there's quite a number of times when a staff representative is prepared to arbitrate a case dealing with testing that we will either bring him into the Pittsburgh office and spend the necessary time to instruct him on how to present the case or we will go to his location and do the same thing.

[24.114] If it appears to us that the staff representative can adequately present the case we will ask him to do so. If not, we will present the case.

Or if, if there is a case that we think has company-wide or industry-wide ramifications we would present that case ourselves.

Q Is your department presently involved in any kind of testing issue at Lukens?

A Yes, we are.

Q And what is being done by your department?

A At the current time we have requested from the company by letter a copy of the test, the test manual, a copy of the validation data and certain other material. We are awaiting receipt of that material to make an analysis of the case, and that case will probably be presented by Patty Seehafer from my staff.

Q Presented where?

A In arbitration.

THE COURT: When did you write the letter?

THE WITNESS: I don't know the exact date.

THE COURT: Well, give us your best estimate.

THE WITNESS: Patty Seehafer wrote the [24.115] letter to the company, one of my technicians, I would say during the last three months.

THE COURT: Thank you.

BY MS. CLARK:

Q You said that you were part of the negotiations on testing each year. Did that include 1968?

A Yes, it did.

Q What provisions were negotiated at the industry level that year on testing?

A In 1968 we made the first breakthrough and we were able to negotiate the language which required the company to have job-related tests.

THE COURT: I don't think you mean that, do you? You didn't require the company to have job-related tests. But if they were going to have tests, they had to be job-related.

THE WITNESS: That's right.

BY MS. CLARK:

Q Was there some revision in the contract with respect to racially biased tests?

A Yes, there is.

Q When did that contract take effect?

A The contract took effect on August 1, 1968. The testing language dealing with the job-relatedness was delayed for one year to August 1, 1969. The [24.116] reason for that was to allow the company the chance to take out the tests which they were currently using and to replace them with the job-related tests.

Q Were there any improvements made in the testing language in 1971?

A Yes, there was.

Q What were some of the significant ones?

A In 1971 we were able to extend the test language coverage to the trade and craft jobs and apprenticeship jobs which we were not able to cover in 1968.

Q Was there anything on written tests as well?

A I believe we added a clause that either in '71 or '74 that said no written test to be given on a job unless the job involved reading and writing.

* * * *

[24.120] Mr. Gilliam, before testing language was in the basic steel contract, what basis was there in basic steel contracts for a grievance over testing?

A We argued grievances before under the seniority provision of the contract.

Q What kind of success did you have on that?

A Very poor success.

THE COURT: There is no such thing as poor success. There is either success or no success.

THE WITNESS: Well, we had little success.

[24.121] BY MS. CLARK:

Q Was there a time when the union also took to arbitration an argument that the company had no right to test at all?

A Yes, there was.

Q What kind of success did you have on that?

A Well, on those we had no success.

Q When the testing language was first placed in the basic steel agreements, what tests were widely used throughout the basic steel industry?

A Two tests which I encountered most were the Wonderlic and the Bidder Mechanical test of mechanical comprehension.

Q Did the industry stop using those tests when the testing language took effect?

A They did not.

Q What steps did your department take to try to eliminate the use of those tests?

A We became involved in almost every arbitration case that was called to our attention, in an effort to try to dislodge those tests from the industry.

[24.122] Q What result were you hoping to get in those arbitration cases?

A I was hoping to get a ruling from an arbitrator that these tests were not applicable to these jobs in the basic steel industry.

Q Would such a ruling have any impact beyond the individual grievant?

A I thought that it would if I could get the right type of case because the testing language was standard in at least eight or nine of the basic steel companies, and I thought with the same test being utilized and the same language in the agreement, I could get a precedent, which I would carry from one company to another.

Q Were you efforts to do that successful?

A They were, but not until the last year or so.

Q What kind of problems did you run into?

A Well, I ran into great difficulty in isolating the test issue in the arbitration cases. Companies started to pick up a lot of different departments in setting up the criteria, in setting up a successful candidate for the job, other than testing.

Q I direct your attention to Union 175 in front of you. The pages at the beginning have been stamped 465. [24.123] Is that an example of the phenomenon you have been talking about?

A Yes, it is.

Q Why did that present a problem in your arbitration program?

A Well, it made the union approach the cases on lots of different issues, other than tests.

For example, in this particular case, the company had a verbal interview, which the applicant had to submit to. They had—they checked his related training and his background, his actual craft experience, and in many instances, when we would get to arbitration, would say we did not decide to award this job on the basis of testing, but we decided to award it on the basis of his past experience.

Q How then did the arbitrators' decisions breakdown in those kinds of grievances?

A Until last year, the arbitration—arbitrator ruled very narrowly on these cases and they would rule specifically for that grievant in that particular case, and that case only because of the many factors involved.

Q Were there other problems that you had in developing grievances to take to arbitration?

A Yes, there was.

[24.124] I spoke at many conferences at which I talked about the subject, and there always seems to be in many cases a hesitation on the part of the people that were involved in these cases, to some of them, to file grievances.

It seemed to me, and this is my own personal opinion, that sometimes a person that failed a test, was reluctant to tell a union representative because it was a matter of pride in him that he had failed to pass a test, and there was a great difficulty in getting grievances filed in this area.

Q Was there anything that the companies, that you were experienced with, were doing that seemed to prevent you from getting rulings?

A Well, the companies in some cases—they wouldn't grant grievances in the third step and several cases that we were preparing go to arbitration on, suddenly the company would grant the grievance and agreed to put that grievant on the job. It was my own personal opinion that this saved the testing program for the company because there was nothing for us to arbitrate and all they really lost was that they awarded the job to whoever was in the grievance, and they maintained their testing programs.

Q Is there some reason why your office can handle [24.125] grievances on testing, more easily than local testing programs can?

A Testing grievances are much more difficult than testing—I would say with the exception of an arbitration, it is complicated, sensitive cases. Testing cases are probably the most technical and most difficult cases to arbitrate.

Q Is there anything about the arbitration hearings, themselves, that also makes it better for your office to handle them?

A Well, the cases are usually very long. I don't think I've been involved in an arbitration case that involved testing that would last more than five full days. This compares with the normal arbitration case. We could usually hear two in a day. The expenses of arbitrating

a testing case are a great deal more than a normal case because we utilize the services of an expert witness.

The cost of a case, the time that is involved and the fact that they're technically more difficult than others.

Q Because of these difficulties, did you develop some kind of strategy for dealing with the testing issues?

A Yes. I developed the technique of a special [24.126] way to arbitrate these cases for the steel workers, and I tried to seek out cases that had either company-wide or industry-wide importance to them, and we tried to zero in on those types of cases.

Q Is Union 177 an exhibit there? How is it related to your program?

A Yes, it is.

Q Can you explain how that arbitration award came about?

A Yes this was an arbitration case at the Edward Thompson Irwin Works of U.S. Steel. This was the type of case that I was talking about, when I said we were looking for the ideal case to arbitrate.

MR. LANDIS: Excuse me, your Honor, does the objection that I noted earlier carry on to this?

THE COURT: Affirmative.

MR. LANDIS: Thank you.

THE WITNESS: The reason I thought that this case was important is because for the first time we were able to find a grievance where the company had answered in the second step and began in the third step that the management representative concluded that tests were the sole criteria which determined that these individuals did not get the job.

[24.127] BY MS. CLARK:

Q What was the outcome of this grievance?

A This grievance was sustained in arbitration and the cause of it, the entire test battery that U.S. Steel was utilizing was taken out.

Q How broadly was U.S. Steel using that test battery?

A I was told by the company that they were utilizing this test battery in every plant of U.S. Steel.

Q Approximately how many testing cases have you personally presented to an arbitrator?

A I would say better than twenty.

Q From that experience, can you say whether steel industry arbitrators are competent to handle the issue of job relatedness under the contract?

A I would say they're competent to handle.

Q What is your department's win-lose record on arbitrations under the job-related language?

A Basic steel?

Q Yes.

A We never lost a case in basic steel that I know.

Q Have you had some experience with the federal government enforcement agencies about the job-related standard that they enforce?

[24.128] A Yes, I have.

Q How does the contract standard in basic steel compare to the government's view of job-relatedness under the law?

THE COURT: Which government are you talking about, the FEA or the EEOC or the Department of Justice?

MS. CLARK: Mr. Gilliam can tell us.

THE WITNESS: Well, I had discussions with Mr. Bock Moore, who is the Justice Department's representative on our committee which oversees the consent decree of the steel industry.

Bock Moore explained to me how the government explained job-relatedness and he said, for example, if the company was utilizing a philosophy, a test to select electricians from the company could prove to them that the employees that pass that test made better electricians, he would consider job-relatedness and we had quite a

discussion and he said well, Dee, I'm not saying that this is the same job-relatedness that you have in the basic steel contracts.

Q Can you explain what the job-relatedness standard means under the—

A Job-relatedness means to me that all of the tests must pertain to specific requirements of the [24.129] job involved.

Q Have arbitrators adopted that interpretation of the language?

A I believe they have.

Q Is there an example in front of you of such an arbitration decision?

A Yes, it is Union Exhibit-177.

Q Can you direct us to the page which such a ruling is made?

A I think on page 41—it starts with paragraph 41. Page 31, paragraph 41.

Q Are there reasons why you would prefer to challenge the test under the job-related standard, rather than under the racial bias standard?

A Yes, there is—if I can win a grievance and arbitration on job-relatedness, it applies to everyone in that bargaining unit.

If I would win a case under the cultural bias, I'm not too sure whether it would apply to the entire bargaining unit or not and since I have been successful in every case that we had arbitrated on job-relatedness, I saw no reason to change.

* * * *

[24.131] Q Has your department undertaken any activities outside the collective bargaining process and negotiations to try to restrict the use of these tests?

A Yes, we have. Two that I can remember. One we participated by filing a brief in the Duke Power case. The second item is that we participated in the National Testing Conference held at Hamilton University.

Q Union Exhibit 149, which is there in front of you, is that the brief that was filed for the steel workers?

A Yes, it is.

Q Does your department have anything to do with preparing that brief?

A Yes, I did some of the research work on this and I corroborated with Mr. Michael Goddess and one of our attorneys in the—who filed the brief.

Q And Exhibit 150 in front of you there, could you tell us briefly what that is and what the union was trying to do?

A Yes. This is a letter pertaining to the draft set of proposed guidelines on employing selection procedures. This letter was compiled by our legal office in Washington and this was to make comments on [24.132] a proposed set of guidelines when they were merging with the EEOC and FEA guidelines.

Q What would the union want to be done there?

A I was worried in the combining of the guidelines that there was going to be a loosening up of the validation requirements for testing and that we would have a weakening in the process of approving tests to be used for selection of employees.

Q Did your department have anything to do with the preparation of that statement?

A Yes. We had done some of the research work for this paper policy.

* * * *

[24.170] ERNEST C. WILLS, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SILBERMAN:

Q By whom are you employed, Mr. Wills?

A I'm employed by the Department of Labor, Occupational Safety and Health.

Q For how long have you worked for OSHA?

A Since August of last year.

Q Prior to that you worked for Lukens; is that right?

A Yes, I did.

Q For how long did you work for Lukens?

A 31 years, six months.

* * * *

[24.172] Q You were elected a grievance committeeman in 1967; is that right?

A Yes, I was.

Q You served as a committeeman until 1979?

A Yes, I did.

Q You were on the negotiating committee each year during that period except for the 1971 contract?

A That's correct.

Q After the April 1979 election, were you chosen for any other union position?

A I was elected as the grievance committeeman for all of the grievance men.

Q Grievance chairman, you mean?

A Grievance chairman.

* * * *

[24.173] Q During the 12 years that you were on the grievance committee, was it ever the union's official policy not to refuse to file or process grievances alleging racial discrimination?

THE COURT: You said was it their policy not to refuse to file.

BY MR. SILBERMAN:

Q Was it ever the official policy to refuse to file or process grievances alleging race discrimination?

A No, it wasn't.

Q Did you have any—in your experience, what was the effect of alleging race discrimination in a grievance?

A If we would try to argue race discrimination it seemed as though the labor relations department always argued a little harder, because they tried to give the [24.174] opinion that they didn't look at the black people that way. It was better for us to file a grievance under a violation of the contract and try to stick to an article.

Q Did you ever allege race discrimination in any grievances you handled?

A Yes, I have.

Q Take a look at Union 261, if you will. Did you file that grievance?

A Yes, I did.

Q Take a look at the statement of the union's position at the third step meeting. Is that an accurate statement of the union's position?

A Yes, it is.

Q Now, the last page indicates this grievance was withdrawn. Why was that?

A Well, the two people eventually got the job. I went back and I talked to them, and I asked them what they wanted to do with this grievance, and they said, "Well, since we have the job, withdraw the grievance."

* * * *

[24.197] RONALD PATTON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. CLARK:

Q Mr. Patton, you work for Lukens Steel?

A Yes.

Q What is your job?

A I'm a BP operator.

Q In what department?

A Pickling.

THE COURT: What's BP?

THE WITNESS: Blast pickle operator.

BY MS. CLARK:

Q How long have you worked in that department?

A 28 years.

* * * *

[24.198] Q How long have you been active in the union?

A Since about 1965.

Q You have a present position in the union?

A I'm on the grievance committee.

Q Which zone?

A 11.

Q About how many times have you been elected to that position?

A Three.

Q What does your zone include?

A Cladding, finishing and pickling.

* * *

[24.206] Q Are you familiar with the computer scheduling system in two of the [departments] that you serviced?

A Yes.

Q Have you received complaints by employees about the way—

A Yes.

Q Who have you received complaints from?

A From Don Smith and Wilfred Mayfield.

Q What is Mr. Smith's race?

A White.

Q He is the shop steward?

A Yes, he was.

Q What has been done in response to those complaints?

[24.207] A Well, we have had five or six meetings on changing the computer programming to correspond with the contract.

Q Is the union in agreement that some change should be made?

A Yes.

Q Why has no agreement yet been reached?

A Because we can't get the parties together all at the same time, and in the past year or so we had four different chairmen.

Q Are there some details yet to be worked out?

A Yes, there is.

Q What is the union's policy about handling the grievance of black employees?

A Same. They are all the same.

Q You mean the same as white employees?

A Yes.

Q Have you ever failed to follow that policy?

A No.

Q Do you know of any other grievance representatives who failed to follow it?

A No.

Q Does the union have a policy about alleging race discrimination in grievances that you file?

A Come again?

[24.208] Q Is there a union policy or procedure with reference to putting race discrimination in grievances?

A No, all the same.

Q When an employee has a discrimination, has a complaint of discrimination, how do you handle it?

A Well, at one time I would just go ahead and file a grievance, and I sat down with the head of the Civil Rights Committee one time and he told me that, you know, send the person to him so he could talk to him and investigate, then if we couldn't come to no satisfaction we would put it in the grievance procedure.

Q And who was the head of the committee you spoke with?

A Tommy James.

* * * *

[25.3] JAMES JONES, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. CLARK:

* * * *

Q What is your current employment?

A I'm a member of the Pennsylvania Labor Relations Board. I'm a retiree of the United States Steel Workers of America, and I'm also the president of the Negro Trade Leadership Union Council.

Q Could you give us a summary of the positions you've held in the steel workers union before you retired?

A Originally I was a volunteer organizer. From that I became a staff [25.4] representative and later on I became an International representative and following that an assistant to the president of the United Steel Workers.

Q Do you recall when it was that you were appointed assistant to the president?

A At the time the election of president I. W. Abel. I forget the time.

Q The mid-sixties?

A I suppose.

Q Approximately when did you retire from the steel workers?

A 1970.

Q Did you serve on any union committees at the International level?

A I served on the legislative committee, the political education committee and the civil rights committee.

Q What were your responsibilities as a staff representative and later as a representative in the International Union?

A Duties as a staff representative covered—namely, I would organize and negotiate contracts and carry out the policies of the International Union.

Q Within the International Union as an International representative, what were your responsibilities? [25.5] A It was more like troubleshooting in those

days, going around the country finding out what the conditions were and to report back to the International officers and executive board members.

Q Was there one subject more than any other that you focused on in that position?

A Yes. The question of civil rights and equality of opportunity was one of my major functions.

Q Have you held other positions with public bodies or political and civil rights organizations?

A Yes. I was one of the early members of the Philadelphia Fellowship Commission.

I was also the founder of the Council for Equal Job Opportunity, which is a constituent agency of the Fellowship job agency, and I was also a [founding] member of the Chapter for [Americans for] Democratic Action, and I was also the chairman of Labor Committee, NAACP, executive board member of the Urban League and I can go on.

Q What about public commissions, other than the Pennsylvania Labor Relations Board?

A I served as a member of the apprenticeship and training council appointed by the Governor.

I was also appointed by the Governor to the Youth Development Centers of the Eastern part [25.6] of the State of Pennsylvania, appointed by the Governor.

I was also one of the original members of the Philadelphia Human Relation Commission, established under the Philadelphia Charter, appointed by Former Mayor Joe Clark.

Q Did you hold any of these positions while you were employed by the steel workers union?

A I was a member of the steel workers union when I served in all of these capacities.

* * * *

[25.12] Q In your position with the legislative committee of steel workers, did you participate in the union's activities supporting various legislative efforts?

A Yes, I did.

Q What was the union's position on civil rights legislation?

A The union's position was to not only support the organization, but sometimes even get certain congressmen and legislators to introduce pieces of legislation that would guarantee equal opportunity, and that sort of stuff. The union did that, and I helped.

Q Can you recall some of the specific kinds of legislation that you supported?

A The establishment of the first FEPC law in the State of Pennsylvania. Our union was in the forefront of that.

And, as far as the other legislation in the State of Pennsylvania, and also the national government, we were in the forefront of that.

We were also in the forefront of helping to establish the Human Relations Commission in the City of Philadelphia, and I worked on that very hard myself as a member of the steel workers union.

* * * *

[25.58] CARL CANNON, sworn.

DIRECT EXAMINATION

BY MR. SILBERMAN:

Q Mr. Cannon, you're employed by Lukens; is that right?

A Yes.

Q Do you have an alias by which your name might be known to the Court?

A Cookie.

THE COURT: Cookie or Cokie?

THE WITNESS: Cookie.

BY MR. SILBERMAN:

Q What job do you hold presently?

A Strand Cast foreman.

Q How long have you been a foreman?

A Since June of 1974.

Q Can you run down the positions you've held in the union before you went to management?

A Well, I was Zone Committeeman, I was treasurer. [25.59] I was Chairman of the Civil Rights Committee and I was on the legislative PAC Committees.

Q Let's see if we can get some dates here.

Am I right you were Assistant Committeeman from '67 to '70?

A Yes.

Q And then committeeman from '70 until you became a foreman in '74?

A Yes.

Q You were treasurer from '69 to '73?

A Yes.

Q Is that right? And you were Chairman of the Civil Rights Committee from '70 to '73?

A Yes.

Q Were you involved in any of the negotiations as part of the union negotiating committee?

A Yes, I was.

Q Which contracts were those?

A 1971 and 1974.

* * * *

[25.65] Q Were you involved in representing Ramon Middleton in his efforts to get into the strand cast facility?

A Yes.

Q Were you his committeeman?

A Yes.

Q How did you first become involved in the Middleton case?

A Well, he came in and told me that he had applied for the position in strand casting and he wasn't accepted, but no one had told him the reason why he wasn't accepted.

So I told him I'd look into it for him, so I got with the company to find out why he wasn't accepted and they told me that it was on the foreman's evaluation.

Q And what did you do when you learned that?

A I came back and told Mr. Middleton about it.

[25.66] Q What else did you do?

A We sat down and we talked about it and we—

Q Who's the "we" here?

A Middleton and I. And we figured the best avenue to take to try to get it resolved—

Q Did you have—before we get into that, did you have any discussions with anybody from the company about Mr.—once you learned why Mr. Middleton was passed over?

A Yes, we had talked—I had talked first with John Muhs and then I had talked—Harry Cavuto and I had talks with John Muhs and John Ryan.

Q What did you, as a union representative, say to Mr. Muhs and Mr. Ryan about the Middleton matter?

A Well, I told him I thought he should reconsider because the foreman could have a biased opinion.

Q Now, was Mr. Middleton's name included in the list of employees to be given preferential consideration?

A Yes, it was.

Q After those negotiations, did you have any further involvement in representing Mr. Middleton in his efforts to get into strand casting?

A Yes. I think it was in March, he came to me again and at that time we figured we would file a [25.67] civil rights complaint with the local union.

Q Why did you decide to go that route, rather than say, file a grievance?

A Because we figured if we filed a grievance, it would take longer because we'd have to put discrimination into it and discrimination issues take a long time to resolve, and we figured that if we file a civil rights complaint, they know it's discrimination from the start and probably it would be handled faster.

Q When you say, we, who's the we?

A Ramon and I.

[25.68] Q He had conversations?

A Yes.

Q And did he agree or disagree?

A He agreed with the proposal I had put before him.

* * * *

[25.70] Q After Mr. Middleton got into the strand casting facility, did you file a grievance to get his seniority corrected?

A No.

Q Why not?

A Because he wanted to go to the outside agency, and he figured that would straighten the things out.

Q Did anybody who came off the preference list [25.71] into the strand cast subdivision have their seniority adjusted?

A No.

Q Take a look at Union Exhibit 486 for a moment, if you will.

What is that document?

A It is a document stating that 180 days after the strand casting operation was put into effect, there wouldn't be any grievance filed as to the job evaluation.

Q To your knowledge, did the union sign any other agreement waiving the right to file grievances to any other matters pertaining to strand casting?

A Not that I know of. I wasn't even aware of this when it happened.

* * * *

[25.81] Q Do you recall in the 1970s, '71 negotiations, the company proposing mergers of various seniority subdivisions?

A Yes.

Q What was the union's response to that proposal?

A The union didn't agree with the mergers.

Q Why not?

A One of the main reasons was because if they merged—the union thought if they merged the seniority units, they would have people from all these seniority units in one and they would be doing each other's work and sooner or later the company would see that they didn't need as many people as they had and they would cut manpower.

Q In the union's judgment, would the company's proposals have increased opportunity for black [25.82] employees or integrated the subdivisions?

A I don't think so, no.

Q Why not?

A Because of some of the mergers that were planned, the plan like—plan in forge and carpenters shop and pipefitters and what have you. They were all in the one seniority unit, one department, and these people in the department would always have first preference to whatever goes on and they would be keeping these departments together, to open hearth pit or the electric furnace pit and the hot top department was another merger and it was predominantly black.

Q Both these subdivisions were?

A Yes.

Q Did the black employees, to your knowledge—did the black employees have the same views toward these proposals or different views as white employees?

A I think all people have the same views because people don't like changes and that would have been a big change.

* * * *

[25.84] Q So far as you were able to observe, was it the practice of any of the Grievance Committee to discriminate against black employees in representing them in their grievances?

A I would say in my presence they didn't.

Q That was the union's policy when you were president of third step and many fourth step meetings while you were committeeman?

A Yes.

Q And Grievance Committee meetings?

A Yes.

Q What was the—while you were active in the union, what was the union's policy if the union thought or suspected the company had discriminated against a black employee?

A Well, they would confront the company about it, and then they'd find out all the pertinent facts and then they'd get back to the individual who made the complaint and if necessary, they would file a discriminatory grievance if they found out the company was in the wrong.

* * * *

[28.85] [CROSS-EXAMINATION]

Q Mr. Cannon, I've shown you a document that's marked Union Exhibit 432. Do you recognize that?

A 432?

Q Yes. 1965 letter appointing a Civil Rights Committee of Local 1165.

A Yes, I do.

Q You served on that committee, did you?

A Yes.

* * * *

[25.86] Q Looking at the document, P-1400, I've shown you, do you recall that at all?

A Yes, I do. This is a committee [formed] in the open hearth—these are sort of the problems we had with supervision and working conditions.

Q And was that the group that took John Muhs up and showed him the Berlin Wall on the west side of the locker rooms?

A Yes.

Q Besides doing that, were you able to accomplish anything with that committee?

A Well, we got some of the problems straightened out in open hearth pit.

Q How did you do that?

A Because we went to supervision and we talked to them about it and they talked in turn to the foreman.

Q Did the union have anything to do with that?

A No, they didn't, just the names on the document I gave them.

Q Now, looking at—I show you a document that was marked yesterday in connection with Mr. James' testimony, Exhibit—Union Exhibit 248, and I'm going [25.87] to ask you to look at the minutes—they're minutes of the Civil Rights Committee, and I'm going to ask you to look first at the minutes of October 30, 1970.

Now, looking at these Civil Rights Committee minutes for October 30, 1970, you were chairman of the union, chairman of the joint company-union Civil Rights Committee then?

A Yes.

Q At the bottom of page 2, it has a question four. Would it be possible for this committee to get a breakdown of hiring by departments in bargaining and salaried units?

The next page, it says, Mr. Domangue provided a listing of bargaining unit employees by number in each subdivision by a breakdown of black and white employees.

I'm going to show you another document and ask if that is the—if that is the breakdown you received. That is Exhibit P-1216.

Do you recall whether that's the breakdown that you received?

A Yes, that's the breakdown.

Q Do you recall—did you pass copies of that on or did the president of the local union get a copy [25.88] of that?

A The president of the local got a copy and in fact he gave me mine.

Q Are you aware of any actions that the Civil Rights Committee took on the basis of that information?

A No, I'm not.

Q Are you aware of any other action that the local union took on the basis of that information?

A No, I'm not.

Q Were there any instances in which that Civil Rights Committee found that racial discrimination had existed?

MR. SILBERMAN: Which Civil Rights Committee?

BY MR. EWING:

Q The company-union Civil Rights Committee, whose minutes you have there in U-248.

Do you recall whether—without looking all through the minutes, from your recollection, do you recall whether there were any instances?

A I'm not aware of any instances where the company admitted that there was—really that there was any. All the complaints we had, we talked about them, but I'm not sure whether we really settled any [25.89] of them.

Q Do you recall whether that committee, while you were chairman of it, was able to accomplish anything in furthering its purposes?

A Yes. We accomplished one thing, that the people had complaints that there was discrimination and that the company was looking at it and that the union was looking at it.

* * * *

[25.91] [REDIRECT EXAMINATION]

Q Mr. Cannon, do you have—looking at Plaintiffs' 1400, do you have that in front of you?

Do you happen to recall if any members [25.92] of the committee were shop stewards at the time?

A Yes. I think all of them were shop stewards, except Alphonso Jones.

* * * *

[25.96] EARL J. ZITARELLI, having been duly sworn, was examined and testified as follows:

* * * *

[25.99] [DIRECT EXAMINATION]

Q Were you in the courtroom when I read from the testimony for Mr. Middleton?

A Yes.

Q Are you known as Horsey?

A Yes.

Q The incident that Mr. Middleton was—can you comment on that testimony?

THE COURT: Just ask him what happened. No witness can comment on some other witness' testimony unless he is an expert.

THE WITNESS: Well, from what—

THE COURT: Wait for another question.

BY MR. SILBERMAN:

Q Did you ever make the remark that Mr. Middleton attributes to you?

A No, I did not.

Q Are you sure of that?

A I am positive. I am not known to make remarks such as those.

Q Have you ever made a remark such as that?

[25.100] A Never.

* * * *

[25.108] RICHARD JACKS, sworn.

DIRECT EXAMINATION

BY MR. SILBERMAN:

Q You are employed by Lukens, is that right?

A Right.

Q You previously testified on behalf of the plaintiffs in this case?

A Yes, I did.

Q You were elected assistant committeeman in 1970, is that right?

A Yes.

Q You served until 1973?

A Yes.

Q Then you were elected a committeeman in 1976?

A Yes, sir.

Q And served until 1979?

[25.109] A That's right.

Q You are presently a trustee?

A Yes, I am.

Q Have you been on the union executive boards at any time?

A 1970 to '73, then from '76 to today.

Q Have you ever been on the union's negotiating committee?

A Yes, I have.

Q When was that?

A 1977.

* * * *

[25.112] Q Let me ask you to take a look at Union Exhibit 91, if you will.

Did you file that grievance?

A Yes, I did.

Q Why didn't you allege racial discrimination in this grievance?

A There's no way I could prove it.

Q Did you have any conversations with Mr. Mayo, whether to allege discrimination or not?

A Yes, I did.

[25.113] Q What were those conversations?

A Well, because at the time he just walked out of the door of the gassing unit, number one—the air conditioning was broken down and the gassing unit was broken down and he was soaking wet with sweat. He walked out to get a little air and he was holding a thermo—it is a long instrument used to take the temperature

and he was just standing there swinging it as if it was a golf club or something.

At the time, Dale Livingston, the safety area man came by and saw him standing there without a hat, and proceeded to call I think it was, the superintendent, and told him he was not wearing his safety equipment and to write him up.

Q Did you discuss the wording of this grievance with Mr. Mayo before you filed it?

A I'm not sure.

Q Take a look at the last page of the exhibit.

Can you explain that this it?

A This is a portion of the second step section that we made after the negotiations of 1977.

Q After the 1977 negotiations, you brought a large number of grievances back to the second step to try and resolve it?

A That's right.

[25.114] Q And this is the list of some of them in your zone?

A Yes, it is.

Q Now, this indicates that this grievance was withdrawn.

Who decided for the union the disposition of the grievance?

A I did.

Q And why was it withdrawn?

A As far as I know, we had agreed to withdraw from his record.

Q Withdraw?

A The written warning.

Q From his record?

A Yes.

* * * *

[25.116] Q Since you've been active in the union, what has been the union's policy with respect to handling of grievances of black employees?

A We handle all grievances the same.

Q What's been the union's policy if it believed or suspected if the company has discriminated against a black employee because of his race?

A Well, I guess someone would file a grievance with International.

* * * *

[25.117] ELKIN KISTNER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SILBERMAN:

Q By whom are you employed, Mr. Kistner?

A Bredhoff, Gottesman, Cohen & Weinberg.

Q What position do you have with the law firm?

A Legal assistant

* * * *

[25.122] Q Now, take a look at Union Exhibit No. 321. Did you prepare that list?

A Yes, I did.

Q Union 321—

A I am sorry, sir. No, I didn't prepare this list. This was prepared by Benjamin Pilotti, the president of the local.

Q What did you do with respect to this list?

A I verified the racial designations alongside each of the names.

Q How did you do that?

A By going to the computer generated list.

Q Did you find Mr. Pilotti made any mistakes?

A Yes, I did. And for those I circled the names and had written the proper racial designation in the margin.

Q Were there any instances in which you found more than one employee with the same name and different races on this list?

A Yes.

Q How did you deal with that?

A The local union hall has a list of the shop stewards, and on that list they will have the clock number,

the check number of the individuals. By getting the check number you can then go to the [25.123] computer generated list and determine which individual is the shop steward.

Q Have you calculated the number of individuals whose names appear on this list and the percentage of them that are black?

A Yes. I had the list over on the bench. It is on a file card.

(Mr. Silberman handing a card to the witness.)

Q What do your computations show?

A They show that there were 425 on this list who were shop stewards.

Q What percentage are black?

A 23.5.

THE COURT: What was that again, the percentage?

THE WITNESS: 23.5 percent, sir.

THE COURT: Thank you.

Q Take a look at Union Exhibit No. 322. Did you prepare that list?

A No. That is a Local Union 1165 business record.

Q What did you do with this list?

A I wrote B or W for black or white, in the margin next to each name.

Q Did you get that information in the same way [25.124] as to the previous exhibit?

A Yes, I did.

Q Have you calculated the number of individuals listed on this list, and the percentage that are black?

A Yes.

Q What are those figures?

A The total number is 152, and the percentage of black shop stewards is 27.0 percent.

* * * *

[26.3] BEN FISCHER, sworn.

DIRECT EXAMINATION

BY MS. CLARK:

Q Mr. Fischer, how are you presently employed?

A I am a Consultant and occasionally Lecturer.

Q What is your present address?

A 154 North Belfield Avenue, Pittsburgh, Pennsylvania.

Q If you want to sit back you could pull the microphone closer to you and you would be more comfortable.

THE COURT: Or he could leave it a little farther away if he wants to.

BY MS. CLARK:

Q Could you outline the experience you had with the United Steelworkers of America and its predecessor organization?

A I was the Director of Research of the Aluminum Workers of America, ACIO Union, starting in 19—excuse me, 1941. 1944, when the Aluminum Workers became part of the Steelworkers I was Associate Director of Research of the United Steelworkers of America and employed by the Steelworkers Union until [26.4] December 1, 1978, when I retired.

Q Have you held other positions outside the Steelworkers that are related to the subject matter in this lawsuit?

A I have served, now serve as a Director of the American Arbitration Association. I was the Housing Director of the CIO. I was—I am a member and have been since its inception of the Advisory Committee of the Office of Arbitration Services of the Federal Mediation and Conciliation Service. I hold a number of positions and have for many years of a community nature in the Pittsburgh area. I am currently the Chairman of the Pennsylvania Employment and Training Council, which is a gubernatorial appointment.

Q Have you just completed an appointment in the academic world?

A Oh, yes. I am supposed to this week complete my stint as a Regent Lecturer at the University of California, Berkley, but I was excused for the purpose of coming here and several days I just returned.

Q While you were employed by the United Steelworkers, would you describe the responsibility you had for negotiations on seniority issues?

A Well, anyone who negotiates with major industries and companies is responsible for seniority issues and I have done that since the beginning of my association with the Aluminum Workers and the Steelworkers.

[26.5] I was associated with both the U. S. Steel negotiations and the Bethlehem negotiations since the '40's and in 1954 I was the chief technician or staff person in the U. S. Steel negotiations. And that was the first time an effort was made to inject seniority into the so-called company negotiations and the United Steel Corporation. Prior to that time any seniority discussions of any consequence were carried on by local union with their local management.

Subsequently in 1959 and 1960, in the first formal industry-wide negotiations that took place between the Steelworkers Union and the steel industry as an industry, I was one of the four members of the committee that was carrying on the non-economic negotiations, the major item being seniority and the related questions during the whole period of pre-strike negotiations during the strike and during the period of the Taft-Hartley injunction until January 4, 1960 when the agreement was finally made.

Those negotiations led to the development and creation of the Human Relations Committee involving the major steel companies and the United Steelworkers of America. And I was appointed Chairman of two of the subcommittees or task forces of that program, that dealing with seniority and that dealing with grievance and arbitration questions.

From then on we were in full-blown negotiations almost on a year-round basis for at least six [26.6] years on seniority.

Q And were you part of those negotiations?

A I was the person for the union who was responsible for all of those negotiations.

* * * *

[26.7] Q Can you explain how those negotiations relate to the Gotham group companies?

A My understanding is that the Gotham group, which was organized in the '50's as a result of the companies, most of [26.8] the companies, the major companies, basic steel producers but not in the Coordinating Committee, gathering together in New York at the Gotham Hotel for the purpose of trying to get some involvement in negotiations which would have very great impact on their negotiations even though they were not a part of the Coordinating Committee.

And they apparently came to a conclusion and transmitted it to the industry, that is the Coordinating Committees, and they made an arrangement whereby they would have some kind of participation toward a selective representative of the so-called Gotham group who attend or some of the meetings and have some kind of limited participation. My understanding is the rationale for that was since they were going to be pretty well affected, to put it mildly, by the results of what the Coordinating Committees negotiated, they wanted to have some intimate knowledge throughout of the process that was going on and make some contribution at the industrial level.

Q How is it that the union carries the settlement at the industrial level to companies such as the Gotham group companies?

A Well, in this era of industry bargaining it takes different forms at different times but in this era of industry bargaining the union has tended to record the results of the industry negotiations in a manual or blue

book [26.9] or variously captioned books in connection with each of the negotiations. This is sent to the members of the Board of Directors and of the union and it is sent—excuse me, the Executive Board of the Union—and it is sent to all of the staff representatives of the union throughout the country. They in turn use these documents as their guide for attempting to put into effect or reply to the extent practical the results of the industry negotiations, the negotiations for each of these companies.

My understanding, the industry has a somewhat similar service for its own constituents.

* * * *

[26.11] Q Now, I would like to turn to the general questions of the origin and characteristics of seniority in the basic steel industry. How does seniority apart from any contract non-discrimination clause address problems of employer discrimination?

A The purpose of the seniority is to avoid discrimination. Absent seniority employers through their supervisory organization are required to make decisions as to who works, what work [26.12] they perform, who works overtime, who gets promotions, who is demoted, who is laid off, who is recalled. Absent seniority there would be nothing which would restrict employers except in more recent years certain laws from deciding on a judgmental basis or any basis for that matter who will be affected and by what manner in any and all of these decisions.

Seniority is the response of modern unionism to overcome this infinite potential of all kinds of discrimination based on friendship, relationship, religion, sex, race, ethnic background and so forth. In large industries and certainly in an industry as large and diverse as the steel industry there are all kinds of characteristics of the native just referred to.

The purpose of seniority is to induce the potential for these kinds of judgments being made on non-legitimate grounds, grounds not having to do with doing with operation of necessity, not having to do with extraneous matters, efficiencies.

What you now have is a system of seniority determining who gets preference and who is subject to what kind of assignments, what kind of layoffs, and who gets promotions and who gets transfers and whatever else is in the system of directing employees.

In the basic steel industry, the general pattern of this seniority arrangement is that some measure of [26.13] length of service determines this competition or choices among employees subject to the profitable and legitimate interests of management in making choices outside and contradiction to seniority based on needs of the company for efficiencies and matters that peculiarly are within management's purview.

* * * *

Q If management has chosen an employee on grounds that [26.14] appear to include race, would it be necessary in the grievance procedure to establish that race was the reason in order to win the grievance?

A No, whatever the ground of discrimination are the rules in the steel industry at least are to apply contractual terms and discrimination for whatever reason is not permissible under the contract and never has been.

* * * *

[26.24] Q Mr. Fischer, as of 1959, were you as the key negotiator on seniority aware of racial patterns in initial assignments in various places in the steel industry?

A Yes. The assumed culture of the industry was based on what union people at least took for granted to be a tendency on the part of management to assign blacks to certain operations. These were not necessarily uniform plan by plan. By and large these assignments

would go in a direction of the coke plant or lesser extent blast furnace to the railroad track labor and particular plants with other departments but there you would not get a pattern necessarily but more or less a tradition germane to that plant.

Q What measures, if any, did you as a union negotiator take to address this problem?

A It was always my desire to overcome this problem by [26.25] giving employees at an early point in their career options to transfer out of wherever it was they had initially been assigned to. We succeeded during the '60's in establishing rights of employees with six months of service by which time an employee gets to know enough about a plant so he can know what he might be interested in in the way of long range career to establish rights for those employees and those with more than six months to transfer using service for that purpose, always plant service used for transfer purposes.

And it would also establish the fact that an employee who had a year service, he could transfer anywhere in the plant.

Q What relation did your goal of attaining these transfer rights have to the problem of racial discriminatory initial assignments?

A To the extent that employers had in the past or persisted in assigning employees initially on the basis of a racial consideration, the employee who had been assigned would have the right to overcome that assignment by exercising transfer rights in choosing a career germane to his own preference.

Q Why was it that you took this approach which might be termed as an indirect approach to initial assignment discrimination?

A In industrial unions in America the tradition has always been, some attorneys think it is the law, that employers [26.26] have the right to hire without reference to the collective bargaining process or any rights of the union to intervene. And the right to hire includes the

right to determine where the new employee goes in the plant.

Of course, it is a legal matter that the union does not fully represent the employee until 30 days after his employment.

Q Well, what has management's position been on the subject of expanding transfer rights based on seniority?

A Management has always been opposed to it. It introduces an element of uncertainty in their own plant which the employee who becomes a major actor in the process of planning the careers of employees rather than the employer making that decision. Whatever decision in management that was made the employee can in effect overrule that decision by obtaining a transfer.

Q Are there any cost consequences to management?

A There are cost consequences because whatever training the employee received in the period prior to his transfer is gone down the drain and the employee must start with another individual and train that individual.

There is a second area which can turn out to be a major cost. Once you put the transfer system in place and the employees use it frequently and some employees tend to do so for many reasons of a personal or extraneous or even of [26.27] a frivolous nature. And that can become an inconvenience to management and a significant cost problem.

I have been involved in many discussions with management where they complain to me exactly about these kinds of problems.

Q When did the union first make proposals for broad transfer rights at the industrial level?

A Well, I am certain that some proposals were made in 1959. I do not offhand recall. I seem to think they were made in the '50's.

Q When was it that management first began to move toward granting these proposals?

A In 1962 when the Human Relations Committee reported. And might I say the joint report of the Human

Relations Committee on seniority was substantially two reports, one by the union members and one by the management members. It came up to the negotiators and then proposed these rather different approaches.

Q What were the events that made management willing to move in this direction?

A Well, beginning in about 1954, for the first time during the union's existence in the steel industry we began to have layoffs of a significant long length and you began to have two groups wide-spread in the steel communities of young people having worked in plants and older people sitting at [26.28] home even to the point of having a father out of work and the son working because of the operations of narrow seniority. This became so unfair and so embarrassing both to the union and to the management that they began to address this problem.

But it was not an easy problem to resolve. It was not until the '60's that all the pieces were put together to get on the road to its resolution.

Q What was the first year in which any substantial progress was made?

A 1962.

Q And what was it that you did to address these concerns in 1962?

A Well, the parties had to zero in on the major question which was the types of layoffs. Therefore they set up seniority pools and for the first time plant service would be used amongst the employees on the identified pool jobs in determining which one would be laid off and subsequently which order they would be recalled. And this was a substantial change, I might even say a revolution in the steel industry.

Almost as the inevitable [corollary] of this transfer rights began to appear within the structure of these pool arrangements in 1962 and it wasn't until 1968 that process matured.

* * * *

[26.33B] Q Under the contract as it stood before you had a non-discrimination clause, how did the contract provisions relating to discipline apply in a situation where there seemed to be unequal treatment?

A Well, one of the primary means by which a union advocate in an arbitration proceeding would challenge discipline other than challenging the facts as to whether the employee actually did it, was accused of doing, was to show that the company was exercising disparate treatment for employees of similar kind of alleged offenses.

So, inherent in the whole processing of challenges of disciplinary action would be challenges the company had treated people with disparity, which, of course, means discrimination. It became pretty much the obligation of management to prove that any such discrimination was justified.

I would use as an example the fact that they might treat an employee with 20 years service and an employee with six months service for a similar kind of offense. It would have to be something of that nature, not the person's race or his color, or ethnic background, or his union activity or anything of that sort, clearly those were not acceptable criteria between people.

Q Was a non-discrimination clause necessary in order to address problems of wage discrimination?

A No. Because that had been addressed [by] the union in [26.34] 1944 with the establishment of the so-called C.W.S., which is the wage determination system effective throughout the steel industry. That had removed from the question supervisor judgment. [The determination] of a proper wage of an employee and just became a matter of applying this jointly negotiated manual, which is used throughout the steel industry not only by the coordinating companies but I think other companies that make steel.

* * * *

[26.35] Q Let me direct your attention to Union Exhibit 158 which I will bring to you now. The final page of that exhibit, does that accurately reflect—

MR. BORISH: Excuse me. Could we have a copy of that, please? We don't have a copy.

(Pause.)

BY MS. CLARK:

Q Does the proposal on the final page of that exhibit reflect the actual proposal made to the industry by the union?

A It is the proposal.

Q Did the industry agree to the full scope of that proposal?

A No.

Q What was the extent of the industry's willingness to agree?

A They did not then, to the best of my knowledge never have agreed to any contractual clause dealing with the hiring of employees.

Q What reasons did they offer for that refusal?

A This industry and most industries consider the question of who to hire is an exclusive matter for management. It is not an appropriate subject for collective bargaining.

[26.36] Q How does that relate to initial assignments?

A When you hire somebody you don't just allow them into the general vicinity of the plant. You have to hire them into some job.

So inherent in the process of the right to hire is the right to initially assign the employee. And that in fact is what takes place in the steel industry. And this is why the union in order to overcome this continued bar

of getting involved in the hiring and initial assignment area has resorted and still resorts to the best of my knowledge to a transfer system so that employees who are hired into jobs and departments not to their liking will have an opportunity promptly to transfer out.

* * * *

Q Mr. Fischer, I show you an exhibit that is in evidence as Union 623 and directing your attention that has at the top of it the language or the words Article 19, Non-Discrimination. Can you tell me whether that is the language of the clause that was agreed to at the industry level in 1962?

A To the best of my knowledge, it is.

Q What was, if you could briefly describe, the subsequent negotiations on the scope of the non-discrimination clause at the industry level?

[26.37] A Well, the parties continued to lock horns over the question of whether non-discrimination considerations should apply to a matter of hiring and initial assignment. The [respective] positions of the parties remains the same.

The union somewhere along the line, I think it was probably in '68 or '71, did secure one improvement or one change. Formally the probationary period would vary slightly and the language governing that varies from contract to contract and company by company but basically a probationary period is a period which the employer has virtually unrestricted rights to do as they want about an employee. So that if they feel they made some error in hiring that employee they don't have to go to the hazards of the grievance procedure to transfer that employee or let him go. Once that employee has completed the probationary period then all the contractual period are there to protect that employee's status.

In some negotiations, I think it was either '68 or '71, the industry did agree that relatively unrestricted right that management had during the probationary period

would be qualified so that those rights could not be used to discriminate against employees on account of race, color, religious creed or national origin. To the best of my knowledge, that is in effect in the major steel contracts now.

* * * *

[26.40] Q Mr. Fischer, I call your attention to Exhibit No. 241, Page 2 and a paragraph that is numbered 4.

A Yes.

Q Can you comment on that paragraph?

A Yes. I think it is an accurate and a revealing statement of the attitude of the official family of the union at that time.

Q The particular reference to the non-discrimination clause there, can you comment on that in light of your testimony that seniority doesn't require non-discrimination clause?

A Well, you will note that the first sentence says negotiation of an [anti] discrimination clause in the April, 1962 agreement which in combination with other provisions contained in the seniority section of that contract—it is that combination that is, of course, significant because I personally would not believe that the anti-discrimination clause would be a very effective clause if it were not for the seniority provision because the seniority provision establishes the real substance of the right of the employees.

Q Would the transfer rights be sufficient to accomplish that purpose without a non-discrimination clause?

A They are sufficient to the best of my knowledge. That is the only thing that actually is applied and when applied to the anti-discrimination you apply it. When you violate a person's seniority [for any] reason you violate it.

[26.42] Q What negotiations occurred on the subject of testing?

A Well, there were repeated negotiations on testing because there was during the period when the EEOC was advocating to management that they should employ testing. But with a very active opposition at least to the Steelworkers' Union to the best of my knowledge the EEOC still takes that position for reasons I don't think are germane. To the best of my knowledge many unions, certainly the Steelworkers' Union, oppose this position.

Q What are the union's primary concerns about testing in the industrial sense?

A Testing is a term that is used in the industrial [26.43] setting really means exposing employees to written tests that do not measure in fact whether the employee can perform the job or not but it is a fairly remote, indirect and unproved and unprovable psychological methodology to determine whether an employee is qualified to do a job.

I personally do not believe any of these testing procedures measuring any legitimate goal.

Let me give you an outstanding example which is an employee who is seeking a job which in no sense requires that he know how to read or write as being asked to pass a test which requires, in order to take the test he must know how to read or write. Obviously that and that alone disqualifies that in my way of thinking which is job related. EEOC doesn't agree with that position.

Q What testing practices does the union have with management in the union's goal of broad transfer rights?

A To the extent management would test people who were seeking transfers, they could overcome through the testing method the seniority rights that the employee was exercising to obtain a transfer.

Q Was there any relation to your concerns about initial assignment practices that had opted against black employees in the industry?

A Of course, studies the union had undertaken. Past years indicated that many parts of the country on the

average [26.44] black employees had been subjected in the general culture of their communities to disadvantageous education, exposure and practices and any tests therefore which really tested one's educational achievements or the consequences of those achievements would necessarily therefore have to be disadvantageous. On the average blacks against whites in the cultural or educational system produce that kind of disadvantageous relationship. I am not sure whether it still applies.

Q What did the union do to prevent it?

A First, abolition of tests and then got the industry to join with it in a very extensive survey of testing within the industry and then a whole series of very intensive negotiations to try to remedy some of what the union considered to be abuses in the way of tests.

Q What was the outcome of that?

A The first time in the collective bargaining agreement criteria of the testing had been included in a collective bargaining agreement and subsequent improvements in the so-called testing clause in the steel agreements.

Q What was the year that you obtained a testing clause in the steel agreement?

A Probably '68. I wouldn't swear to it.

Q What were the key provisions of the testing language?

A That testing had to be in all instances job related, that is to say related to only the determination of whether [26.45] the employee could perform the job involved. There was only one exception and that is in certain instances carefully proscribed the company could also try to determine whether that employee seeking a job could perform the next higher job on the theory that part of the function of an employee's certain situation was to fill in for vacations and sickness, et cetra. Therefore they needed a reasonable number of employees on the job who could perform this job of filling in in the next higher function. Even that was very carefully proscribed.

Q Was there language included in the written test?

A A specific clause saying you could not use written tests in the event an employee seeking a job which did not require an ability to write or an ability to read.

* * * *

[26.46] Q What, if anything, did the union do in negotiations on the subject of access to apprenticeships?

A Well, first we again, after conducting joint studies of the industry developed contract language which made clear something which I personally thought was clear in the first instance but which was not taken very seriously. In practice by either side, namely that the employees had a seniority right to an apprentice job. One of the reasons that hadn't been taken very seriously is because employers had made arrangements with the United States Government and various states permitting to set up various employee criteria and age limitations which effectively defeated the seniority agreement. The union sought to have the Government to get that changed and the steel industry. Our second job was to make it clear these vacancies would be filled through the normal seniority process and there was language which had to do with the testing procedure to try to bring this under the general philosophy of testing that the agreement reflected in other areas, the difference being that in the case of an apprentice you are not testing a person for a job he is going to perform but rather for an assignment which is going to expose them to an extensive period of training and education.

So what you are trying to determine is whether that employee can absorb that training and education. [26.47] That is a much more difficult and complicated matter than testing for a job that the employee has in fact performed.

Q You earlier mentioned in your testimony that the craft jobs were predominantly white. Did that fact play any part in the union's negotiations on the subject of apprenticeship?

A That was one of the major problems that the union had and certainly that I had in trying to get language and provisions into our agreements which enabled interested blacks to enter the apprenticeship program.

The major move that the union had made, was to make the Millwright job and Motor Man Inspector a craft job. That meant a significant number of blacks who were Millwrights and a few Motor Man Inspectors became craftsmen. The way it was done, the Millwright and Motor Inspector Helper, which there were a large number of blacks, had quick access to the Millwright craft jobs and that is in fact what occurred.

* * * *

[26.62] Q I show you a copy of the United States Steel Corporation's agreement with the Steelworkers for 1974 and ask if this reminds you or helps you answer the question in what year the probationary language was changed to prohibit race discrimination?

A Well, this conclusively says that it was done August 1, 1974. Well, it was in the '74 agreement. It was actually done in April of '74.

* * * *

[26.65] Q One final question, Mr. Fischer. You testified at length about the inherent effect of seniority in preventing discrimination. Was that any part of the union's reason in wanting to get seniority where it does not exist?

A Well, certainly. To give you the ideal example for the reasons that are very difficult to identify. Seniority played a minor role over the years in filling apprenticeship opportunities and it is no coincidence that this is the area in which blacks have the greatest difficulty in gaining access. There is no better way to prevent discrimination than with a meaningful seniority system that gives employees maximum opportunity and options.

* * * *

[27.3] BERNARD STAUB, sworn.

DIRECT EXAMINATION

BY MR. SILBERMAN:

Q Mr. Staub, you are employed as a staff representative of the Steelworkers; is that correct?

A That is correct.

Q For how long have you been so employed?

A I have been employed by the International Union for 23 years.

Q During what period of time did you service Lukens Steel Company?

A In the mid 1960's.

Q And when did you leave, do you recall?

A Pardon?

Q When did you leave?

A Around 1968, I think it was.

* * * *

[27.5] Q What was your personal opinion as staff representative of testing, in use of written tests at that time?

A Well, in general not only at Lukens but in any place that testing was involved, I was opposed to it and particularly at Lukens because they had in the agreement the company could take the position they could test the relative ability of the employees. We were very strongly opposed to the testing. I was particularly strongly opposed to it because of my lack—I only went to eighth grade myself. I didn't have that much education. I thought that people should be given an opportunity to try the job rather than be tested on the basis of skills.

* * * *

[27.6] [CROSS-EXAMINATION]

Q It was your impression, wasn't it, that Lukens made more use of the relative ability clause than other steel companies?

A Well, I would say that because of the size that we had quite a few grievances concerning relative ability, yes.

Q Did you recall forming an opinion that they made more use of it than other steel companies.

MR. KLUGHEIT: Your Honor, I object to the admissibility of his testimony as against defendant Lukens. I don't think his opinion of what Lukens did is relevant at least against my client.

THE COURT: I think it might be. Objection overruled.

Go ahead. Answer it.

THE WITNESS: I don't think that they did anything different than the rest of the steel industry except that they used these tests. I didn't have anything to do with U. S. Steel at the time and I know that was one of the big problems in those negotiations, testing in general throughout the industry.

So that I don't know whether they used any more or any less. We were opposed to it.

[27.7] BY MR. EWING:

Q Do you recall at your deposition, Page 37 starting at Line 23, my asking you this question: "Was there any discussion in connection with the collective bargaining negotiations or anything else at Lukens regarding their testing policies?" And your answer: "Lukens was, you know, they had relative ability in their agreement and most of the basic steel companies do and Lukens probably used it more than any of the others."

A They probably did. They probably took more advantage of the testing than some of the other plants.

* * * *

[27.8] Q Let me ask you about do you recall saying this in your deposition on Page 36 starting at Line 18: "And I am going to be honest with you. There was a

lot of blacks in disagreeable jobs. There is no question about it and I think that is true in any steel mill."

And I asked: "Were there heavier proportions of blacks in disagreeable jobs in the mill as a whole?" You said: "I think that is probably true."

A I did say I think that is probably true.

Q You still think that?

A Well, I would be guessing. I still think it was [27.9] probably true because I think they were probably hired into the disagreeable jobs.

* * * *

[28.32] GEORGE IVAN BARRAGE, SR., sworn

DIRECT EXAMINATION

* * * *

Q Where are you employed?

A Lukens Steel Company.

Q What seniority subdivision do you work in?

A 120 Floor Subdivision.

Q And how long have you been in that unit?

A Since 1961.

* * * *

Q How long have you been active in the union?

A Since 1966, '67, somewhere around that area.

Q What is your current position in the union?

A Chairman of the Trustees and Committeeman.

Q Which zone?

A Zone 5.

* * * *

[28.33] Q About how many times have you been elected to the office of Grievance Committeeman?

A About three or four.

Q And when were you first elected?

A In '66 or '67, somewhere around there.

* * * *

[28.34] Q Is Kenny Young in your zone?

A Yes, he is.

Q Has he come to you with complaints on the subject of overtime?

[28.35] A Yes, he has.

Q What was his complaint?

A About giving overtime to a white Crane Runner.

Q What did you do when you received that complaint?

A I checked out what Kenny said with the Foreman. I checked the Crane Department first and they said they didn't know nothing about it, that they didn't give the guy, Earl Riggins, the overtime, that some other Foreman issued it to him.

Q Did you check further?

A Yes, I did. And the teller notified James Reese he wasn't supposed to give out overtime in that area.

Q Did that result in any change in the practice as far as you know?

A The first time it led to—we talked about it, me and Kenny. Kenny came to an agreement they would equalize the overtime between Riggins and Kenny Young.

Then it happened maybe three months to maybe a year from there, I can't remember exactly, it started all over again. This is when I filed the grievance for Kenny, discrimination.

Q The first exhibit in your folder is L-509. The grievance—it is at the third page from the back of that exhibit.

THE COURT: I will bet it is.

[28.36] BY MS. CLARK:

Q Mr. Barrage, the grievance was framed only for the week of July 9, 1978. Do you know why it is it was drawn only on one week?

A Because that is the week that it was happening.

Q Why don't you back up from the microphone.

THE COURT: Just do not lean forward.

MS. CLARK: Fine.

BY MS. CLARK:

Q After this grievance was filed, what happened?

A I checked out with the Crane Department for Kenny whether they were doing this and I found out by checking that Kenny was getting his proper amount of overtime but Kenny was getting it all over the mill.

Q On different cranes?

A On different cranes.

Q And was Mr. Riggins being treated differently?

A I felt that Earl Riggins was getting his overtime in that crane on the preferred job.

Q What was the result of the grievance?

A It was withdrawn by the union, something about Kenny was supposed—in other words, I told Kenny to file a civil rights complaint on it. Because I felt he was being discriminated against.

Q And do you know whether he filed such a complaint?

[28.37] A Yes, I do.

Q Since that complaint has been filed, do you know whether it has been resolved?

A Yes, it has.

Q Has Mr. Young complained to you since then of any problem relating to the distribution of overtime?

A No, he hasn't, not on this subject.

Q Just to keep the record clear, who is Mr. Reese that you referred to?

A Mr. Reese is not a Crane Foreman, he is a Loading [Bank] Foreman where Earl Riggins and Kenny Young work. He was not supposed to be passing out the overtime.

Q And is it the case that Mr. Riggins and Mr. Young worked on the same crane but on different shifts?

A Yes, it was.

* * * *

[28.59] Q Has anybody ever tried to discourage you from alleging race discrimination from a grievance?

A No.

Q What is the current practice when you have a grievance, a complaint that comes to you and it alleges race discrimination? If a man comes to you and says, "I think I am being discriminated against."

A I check it out. If I tell him that there is nothing there, he says, "I want to file a grievance," I definitely still will file a grievance for him whether there is or isn't. I feel he has a right, he pays his union dues to be heard whether it is right or wrong.

* * * *

[28.62] BENJAMIN PILOTTI, previously sworn.

THE COURT: You are still under oath, Mr. Pilotti. Proceed.

DIRECT EXAMINATION

* * * *

[28.69] Q Now, we have had testimony about the negotiation of the contract language on testing. Since that language was placed in the contract, what has the union done in response to employee complaints about testing?

A Where we get a complaint we feel worth relating, we would file or process a grievance.

Q Are there any grievances pending on the subject of tests now?

A There is a grievance pending where Machinists failed to test going from "B" Machinist to "A" Machinist. And we have grievances pending where people were denied entering the apprentice program.

Q What test was involved there?

A A math test.

Q Is that the one they call the Shop math test?

A Yes, in the apprentice program.

Q Which grievances are the ones that the International Union is currently consulted on?

A The apprentice, the math test.

* * * *

[28.79] Q Union 264, is that another of the grievances you mentioned when you testified previously?

A Yes. I helped to word this grievance on behalf of Virginia Washington and it was turned over to Thomas James. He was the Grievance Man in that area.

Q As far as you know, are the minutes that record what happened in the grievance proceeding accurate?

A Yes, I would say so.

* * * *

[28.83] Q Does [Monroe] Jones work in your zone?

A Yes.

Q Was there an occasion when he came to you with a complaint that a Foreman was tutoring some white employees who were taking the same test he was taking?

A Yes, that is the complaint he made to me.

Q What did you do?

[28.84] A I arranged a meeting with his immediate supervisor and made the charge that they were favoring other employees on testing.

Q Who was present at that meeting?

A Monroe Jones, Donald Kleintop and myself.

Q Was anything done as a result of that meeting?

A The Supervisor Kleintop made an investigation and made the proper corrections because Monroe Jones became an "A" Painter right after that.

Q Did you understand he took the upgrading test and passed it?

A Yes.

Q Did you tell Mr. Jones that he couldn't file a grievance about this incident?

A No.

Q Was there anything left for him to file a grievance about?

A No. He got the rate.

Q Did he come to you at any time after that to ask you to handle some other complaint?

A Yes. Monroe Jones came to me one time and he alleged that it wasn't fair that the junior people would work all the 4:00 to 12:00, the back turns, when they had worked in the offices.

Q Was he junior or senior at that time?

[28.85] A He was junior at that time. I made arrangements that the back turns where they needed Painters would be divided equally amongst all the Painters.

Q And then did he come back to you at some later time with a complaint?

A At a later time Monroe Jones came back to me and made a complaint that he felt the senior people should not be working the back turns, that this should be done by the junior people.

Q Was he senior or junior at that point?

A He was senior.

Q What did you tell him?

A I told him I wasn't going to change the position. They will be rotated.

Q What was Mr. Jones' reaction to that?

A He was very bitter about it.

* * * *

[28.88] Q P-710 is the next exhibit there. Do you know anything about the circumstances when this grievance was filed?

[28.89] A Yes. I was in the office when Mr. London come in after this incident. And he told Mr. Brown what happened where he alleged that a Mr. Taylor called him a black bastard or something to that effect.

Q Mr. Brown, is that James Brown?

A Jim Brown, yes, Chairman of the Grievance Committee.

Q What was the company's rule at that time about first offense fighting in the plant?

A The first offense at Lukens at that time was a four-day suspension. The second offense was discharge.

Q Do you know whether the company's practice was uniform in giving four days to people where they were involved in fights and other employees complaining?

A Of my knowledge being a Grievance Man, they were.

Q Did the union on any occasion go to arbitration over a four-day suspension for fighting?

A Not to my knowledge, no.

Q In your presence did Mr. London ask Jim Brown to do anything about the white employee's remark?

A After Mr. London made that complaint to Jim Brown, knowing Jim Brown as I did, Jim Brown did his thing as the Grievance Chairman, he contacted the proper people and see that it would never happen again.

* * * *

[28.93] Q Were you present when Leon Whitfield testified?

A Yes.

Q He testified about the company wanting to create a job called the Super Laborer job. Is that the job described in Union 461?

A Yes.

Q What was the union's position on this issue?

A Well, at that time we tried to, I kind of helped Jim Brown out. I tried to work out an agreement with the incumbents would stay on the job either as Tow Motor or Crane Operator until they retired. Then they would have the Gang Leader do that assignment.

Q So did you keep those people on the Tow Motor from having being forced to work this Super Laborer job?

A Yes.

Q Can you identify Union Exhibit 462?

A Yes.

Q What is that? What is that?

A That is an agreement that Jim Brown, Don Elliott and [28.94] myself worked out with Doug Edwards. I am pretty sure that Tom Scull worded it.

Q Was this agreement ever put into effect?

A No, sir.

Q Why not?

A Well, we had a handshake agreement on there hopefully that Jim would see the rest of the people if they would agree to sign this document.

In the meantime, the supervision was changed in there. Bob Smith became Superintendent of the Refractory Labor and that is when he reneged on this agreement.

Q And what did you do about that?

A We filed a grievance and went to arbitration.

Q Is the grievance and arbitration award on that Union 357?

A Yes.

Q What was the result of the arbitration award?

A The company was upheld.

Q Did you attend the meeting between Mr. Mont[] and Mr. Whitfield which was described in testimony?

A Yes.

Q Where was that meeting held?

A At the Malvern Subdistrict Office.

Q About what size was the room it was held in?

A Oh, 10 by 13, 11 by 14, somewhere around there. [28.95] Q And how many people were present?

A I was there, Jim Brown, Jim Brewer, Leon Whitfield, and I am pretty sure Horsey Zitarelli was there.

Q Bert Howe?

A Bert Howe, yes.

Q Were you present when Mr. Mont[] walked into the room?

A Yes.

Q For the record, could you describe Mr. Mont['s] voice?

A It is a heavy voice, a loud voice, big like he is.

Q Is it possible that he could have said something inside that room you didn't hear?

A I don't think that is possible.

Q Did you hear him say anything like, "If this matter has anything to do with civil rights, I can't hear it?"

A No.

* * * *

[28.106] Q What years was Donald Book a Committeeman?

A I am pretty sure he was elected Grievance Man in '62.

Q How long did he serve?

A Two years.

* * * *

[28.107] Q Does the secretary of the union maintain a looseleaf notebook with a list of grievances in it?

A Yes.

Q Is Union 692 some sample pages from that notebook?

A Yes.

Q Did you have occasion to use that index from time to time?

A Yes.

Q Is it possible from that index to locate all of the grievances on any given subject?

A No, no. They are filed in numbers, by numbers.

Q For instance, a grievance on testing, would that necessarily show up for the subject designation, the testing?

A No.

* * * *

[28.154] THELMA VAUGHN, sworn.

DIRECT EXAMINATION

BY MS. GARTRELL:

[28.155] Q Mrs. Vaughn, are you the widow of Clarence Vaughn?

A Yes, I am.

Q I have placed in front of you two documents, Union 387 and Union 388 which I am showing you be-

cause at the bottom right hand side of each document at Page 1 appears your husband's signature over the line President, Local 1165.

Was your husband ever President of Local 1165?

A My husband was never a duly elected President of Local 1165 at no time.

Q He was elected as Vice President?

A Vice President and served in the absence of the President.

Q Whenever the President was sick or for some reason gone?

A That is right.

Q Are you certain of that?

A I am very certain of that.

Q Were you aware of your husband's union activities in the 1940's?

A Very much aware. In fact, Local 1165 almost began in my house—in our house.

Q Were in fact meetings of the organizers—

A That is right.

Q —held in your house?

A They were.

* * * *

[28.157] Q When the union was just getting organized at Lukens, did the Steelworkers' Organizing Committee promise black employees in Lukens that if they became organized and established as a union they would work for equal job opportunity for black employees?

A Yes, they do.

* * * *

[28.158] Q What year did your husband leave Lukens?

A My husband left Lukens with a heart attack, I will say possibly in '60 or maybe the latter part of '59, the first heart attack. That wasn't a permanent leave though because he went back to Lukens the second time.

Q And when did he permanently leave?

A I think he permanently left in '63.

Q At the time that he last left Lukens, did he express to you whether he had any opinion about whether Local 1165 had discriminated against its black members in its representation of them?

MR. SILBERMAN: Objection, Your Honor.

THE COURT: Objection sustained. It seems to me that is pretty clearly hearsay in violation of the dead man's rule besides.

MS. GARTRELL: He was at that time, Your Honor, a union official. I believe it would be an admission.

THE COURT: I am sorry. What was he at that [28.159] time? Was he a Vice President then?

THE WITNESS: At that time he had, in my insistence he had resigned the second time around as any kind of status in the union. He had to quit because it was a heart condition.

BY MS. GARTRELL:

Q Before he quit the union, did he express to you an opinion as to whether Local 1165 had failed to keep that promise originally made by the Steelworkers' Organizing Committee to work for equal job opportunity?

MR. SILBERMAN: I object.

THE COURT: Overruled.

MR. SILBERMAN: Mr. Vaughn's personal opinion could not be relevant even if alive. We were entitled to have this witness designated so we could take proper discovery.

THE COURT: Overruled.

MS. GARTRELL: I did not know Mrs. Vaughn during the discovery period.

THE COURT: Whose fault is that? I don't think we have an answer to the question.

THE WITNESS: Rephrase it.

MS. GARTRELL: Read the question back.

(The last question was read aloud by the court reporter.)

[28.160] THE WITNESS: Gradually Local Union 1165 began to back off from even some of the contractual

agreements that had been made and for this, because it upset my husband very much, gave him high blood pressure and also eventually according to even the Lukens' doctor who at that time was Dr. Stone, told my husband that he was foolish.

THE COURT: We are not so much concerned why your husband quit but the question is: Did he feel—

THE WITNESS: Yes, he did.

THE COURT: —the union failed to live up to its agreement?

THE WITNESS: Yes, he did.

* * * *

[28.160] CROSS-EXAMINATION

BY MR. SILBERMAN:

Q Mrs. Vaughn, your husband served as Vice President under William Taylor; is that right?

A That is right.

Q And this was during World War II; is that correct?

A Well, it could have been—look, let me make something perfectly clear, maybe you can understand it. I at that [28.161] time was a young woman. I was the wife of a black Steelworker who only knew when things were tough because the reaction and the stress and the pain was felt at home.

Now I know some of these fellows. For instance, the man who is sitting over there. I knew his brother when he was in the union but I don't have any recollection of him because I was not a union member.

Q I understand. You do recall your husband serving under William Taylor. You have established that.

A Yes.

Q Do you recall the spring of 1946, Mr. Taylor became a Foreman and resigned from the union?

A Yes, long before that Mr. Taylor was a very sickly man. So my husband filled in a lot of times for him.

Q And after he resigned from the union your husband became a permanent President until there was a new election; is that right?

A I can't say how many weeks there are because Mr. Taylor tried to last the term out until there would be an election by Local 1165. So if he did it was a matter of weeks.

Q Let me show you a document I will mark as Union 1001 and see if this helps refresh your recollection. This is the employment record card of William Taylor and you see it shows he became Assistant Pit Foreman March 1, 1946. You see, [28.162] looking at Union 387 and 388, your husband signed the grievance as President in August of 1946.

Does that refresh your recollection for about a six-month period your husband served continually as President of Local 1165?

A If my husband served at that time for that period of time, I had no way of knowing. He never at any time expressed to me that "I am now the permanent President of Local 1165."

* * * *

[28.169] DONALD W. SMITH, sworn.

DIRECT EXAMINATION

BY MS. GARTRELL:

Q You are now employed at Lukens Steel Company; is that [28.170] right, Mr. Smith?

A Yes, I am.

Q And what job?

A I am a Test Processor right now in the Metallurgical Test Department.

Q How long have you been in the Metallurgical Test Department?

A I was laid off at one point. I have been there now approximately seven years I think, in that department.

Q How long have you been physically assigned to the area that you are in, the Test Lab; is that right? You are in the Test Lab?

A I have been there since 1978, the summer of '78, July 8th, I think, something like that.

Q Prior to that where were you located in terms of the exact physical location of your job?

A I worked in By-Products Department from I believe 1973 to 1978, approximately five years.

Q During those five years were you a Shop Steward?

A Yes. I was Assistant Committeeman at one time and after that I was Shop Steward for the remainder of my time there.

Q In early 1978 did you become aware that the company was attempting to fire a black employee named Alfred Hicks who worked in By-Products?

[28.171] MR. FEIRSON: Objection. Leading question.

THE COURT: Overruled.

THE WITNESS: That was in the summer of 1978, Alfred Hicks.

BY MS. GARTRELL:

Q And you became aware when it was happening?

A Yes, I did.

Q Why was the company trying to fire Mr. Hicks?

MR. FEIRSON: Objection, no foundation.

THE COURT: What is your understanding of the reason?

BY MS. GARTRELL:

Q What did the company say was the reason they were going to fire Mr. Hicks?

A Mr. Hicks allegedly committed an act of violence towards Superintendent Sam Miller.

Q They said he hit him, right; is that right?

A Yes, yes.

THE COURT: Try to avoid leading the witness. This is not an adverse witness.

BY MS. GARTRELL:

Q Did there come a time when you believed that Mr. Hicks' race had some relationship to the company's attempt to fire him?

MR. FEIRSON: Objection.

[28.172] THE COURT: Objection overruled.

THE WITNESS: I believed that from the beginning of the incident and before in the By-Products Department.

BY MS. GARTRELL:

Q Why did you believe that?

A Because of the on-going incidents that came to my attention almost after I found out, after a while, weekly possibly, sometimes after a while daily basis of the assignment of the personnel within the department.

Q What were the kinds of incidents in By-Products that had come to your attention on a weekly or even daily basis?

A The assignment of the jobs themselves. By-Products is a job shop. The Foremen assign you to work. I think I would have to explain pretty much what the whole set up was of By-Products when I went there in 1973 until 1977. There was no posted schedule. The scheduling was kept in a drawer by the Turn Foreman. There was no posted schedule out in the shop. There was no posting for job opportunities within the department, subdivision positions. In turn the Foreman came out with the scheduling at the end of the week and told the men verbally where they would report to work on the following Monday.

In this nature, once they reported to work on Monday they were then assigned by the Turn Foreman once [28.173] again to the different type of job that may be

running at that particular time. Then when I became aware of the situation—

Q Did you get complaints from black employees who were given job assignments in By-Products in the fashion that you described?

A Yes, because they were aware—the newer employees coming in were aware of their seniority and the fact it first came to my attention, I assumed it was a seniority fact. After a while again I did believe that it went beyond the seniority factor because of the fact that the number of people that were coming to me were the black race.

Q So did you in your own mind come to believe that it was not just a seniority problem but was a racial problem?

A My opinion, yes, it was a racial problem.

Q Now, after Mr. Hicks was fired there was a protest by some of the employees in By-Products; is that right?

A Yes.

Q Will you look at what has been marked as P-1366 and tell me if this is a news article written about the picketing protest which followed the discharge of Mr. Hicks?

A Yes. Yes, I am aware of this.

Q And did you also put together a petition which was addressed to the management of Lukens Steel Company and which you solicited signatures for?

A Yes.

[28.174] Q Is P-1326 the petition that you drafted?

A Yes.

Q When did you draft this petition?

A I drafted this petition the week following Mr. Hicks' firing, the incident.

Q The line which is numbered 4 here, which is concerning management's continuous efforts to create social and racial differences among the hourly employees. Does that line refer to the discharge of Mr. Hicks and to the

scheduling problems that you have already testified about?

MR. LANDIS: Your Honor, I realize that in other instances I have risen to no avail but as to this, I think it is clearly not rebuttal as any of the non-rebuttal evidence that has been offered. And so I would object to it strenuously on the ground that it should have been presented as part of the case in chief and is no part of the case at this time.

THE COURT: Objection overruled.

MR. LANDIS: May I have a continuing objection?

THE COURT: Yes. Avoid leading the witness.

BY MS. GARTRELL:

Q Tell us what number 4 refers to?

A I was trying as nicely as possible to get their attention about the situation. It was an on-going situation [28.175] in the By-Products area. The Turn Foreman assigned personnel to the jobs avoiding the seniority rights and the man had already previously worked on the job operated positions. I contended when you are operating on the job and the Foreman comes by and replaces you with a white employee who has less seniority and less ability on the job, I think that just might cause a little conflict between the men and not in the best interests of the job itself.

Q And had that incident that you described happened in By-Products?

A That incident occurred frequently in By-Products.

Q The document which is marked P-1326 does not bear a date. Can you tell me if the document marked P-1367 relates to P-1326?

A Yes. I took the initiative to send this document by certified mail, three copies, one to George Copeland, Area Superintendent I believe at that time, one to J. L. Pflasterer, he was whatever he was, and William Mullin-

stein. Pflasterer was the Chairman of the Board, I think.

THE COURT: All Lukens' officials?

THE WITNESS: Yes.

BY MS. GARTRELL:

Q And the employees who signed P-1326, were all of those employees located in By-Products?

A Yes, all of those employees were.

[28.176] Q How many signed?

A I went to the seniority listing and found that there was—appeared to be 110 active employees in By-Products in that week. I achieved to get 92 employees to sign the document and I went—I feel I went a little bit out of my way just to explain what this document was all about.

THE COURT: You got 92 of them. Wait for the next question.

BY MS. GARTRELL:

Q And that 92 was both black and white employees?

A Yes, yes.

Q Now, what happened after this petition was sent off? Did you send this to Tom Ryan?

A That week or the—the following week at the union meeting I presented the petition at the time to President Pilotti and asked him if he would present it to Tom Ryan. And the following day I sent three other copies without his knowledge, certified mail, to these officials.

Q Do you know if Tom Ryan ever got the original of the petition?

A I do not know that. I assumed he did.

Q Now, what response did you get from management as a result of your sending in this petition?

A My personal response or—

Q Response by the company.

[28.177] A There was a follow-up meeting was called I was told.

Q Were there in fact two meetings?

A Yes, two meetings.

Q Is P-1369 the notes that you had made indicating the people who attended those two meetings?

A Yes.

Q I notice you have follow-up July 27, 1977. Is that an error and did you mean 1978?

A Yes.

Q And the first meeting was held on July 13, 1978?

A Yes.

Q At either one of those meetings did anybody on behalf of the company address the point in your petition concerning the efforts of management to create racial differences among employees?

A On whose behalf?

Q The number 4, Point 4 of your petition. Did anybody on the company's behalf address that issue in either one of these two meetings?

A Not to my recollection.

Q Did you have any discussion with any of the union representatives as to whether you ought to bring up the matter of Mr. Hicks' discharge at either of those two meetings?

A It was felt at the time I discussed it with Benny Pilotti, I know for a fact I discussed it with "Yi" Brown. [28.178] "Yi" in particular, I remember he felt this thing—he wasn't exactly in favor of the petition. He felt it wasn't really in Mr. Hicks' favor, which I didn't go along with that.

Q What was the nature of your disagreement with him on that?

A I was fully aware what happened to Mr. Hicks. I couldn't see why this type of thing couldn't help Mr. Hicks who I know was innocent, what was alleged.

Q By innocent you know he did not in fact hit his Foreman?

A Yes.

Q Were there a number of employees who were eyewitnesses to verify that he in fact had not hit his Foreman?

A When I heard—the incident occurred, I went over—there were six men on the crew. I went over and talked to the fellows to find out what happened. From there I went down to the office to talk to Sam Miller. I talked to Sam Miller—all six of the people didn't say—yes, there was an argument. They didn't see any act of physical aggression. I went down to talk to Sam Miller. He was upset about what had occurred. He said that he had felt he was under the threat of violence. It meant to me, which I was in there approximately a half hour listening to him, that Mr. Hicks had actually put his hands on him at any time.

Q Did you think that Mr. Hicks' grievance, the one that [28.179] went through the arbitration process, do you think his grievance ought to mention he was fired because of his race?

MR. SILBERMAN: Objection, Your Honor. Mr. Smith's personal opinion is not relevant at this proceeding.

THE COURT: Overruled.

THE WITNESS: Was that overruled?

THE COURT: Yes, go ahead.

BY MS. GARTRELL:

Q You may answer.

A Yes, yes. That is what I felt.

Q Did both Mr. Pilotti and Mr. Brown disagree with you on that?

A At that time.

Q Did they ever explain to your satisfaction their reasons for that disagreement?

MR. SILBERMAN: Your Honor, in addition to my previously stated objection, I object on the grounds we had not been given notice he would testify. The designa-

tion of his testimony of the dissatisfaction with the union, complaints about the union.

THE COURT: Objection overruled.

THE WITNESS: I felt at the time that was their opinion, the petition on Mr. Hicks' behalf was not proper, wouldn't help the situation.

BY MS. GARTRELL:

[28.180] Q To mention race?

A Yes.

Q Is P-1328 the arbitration award as to the incident involving Alfred Hicks, the same Alfred Hicks you and I have just been discussing?

A Yes, it was.

Q And he got his job back without back pay; is that correct?

A He got his job back after four months.

Q He lost four months' pay?

A Yes.

* * * *

[28.181] Q What is [P-1368], Mr. Smith?

A That is a list, of some of the people that I took notes for my own interest of the situations that were frequently occurring involving job postings and honoring of these postings.

Q Are these names of black employees whom you felt should have gotten jobs and who did not?

MR. LANDIS: I will object.

THE COURT: Objection overruled.

MR. LANDIS: Grossly leading.

THE COURT: Objection sustained.

MS. GARTRELL: I am perhaps hopelessly [28.182] trying to wrap up too quickly.

BY THE COURT:

Q When did you make these notes?

A This is a recent copy. I have another older copy of the same.

Q This is a copy of something you made earlier. When did you make the original?

A At the on-going time, approximately about the same time Mr. Hicks—

Q Are all these persons named, listed here, are they all black?

A No, one, two, three—the five top names are. And there is another individual that I know exactly.

BY MS. GARTRELL:

Q Another black employee?

A Yes.

Q What is his name?

A Steve Miller.

* * * *

[28.183] Q Mr. Smith, you still have in front of you P-1368. Why did you write the names of those black employees listed at the top of that page, those five black employees?

A I wrote those names because they stuck in my mind, the particular instance—these individuals came to me first.

THE COURT: You felt they were individuals who are just claims for mistreatment on racial grounds; is that right?

THE WITNESS: Yes.

* * * *

[28.185] Q How were job vacancies filled in By-Products when you were there?

A When I went out there in 1973, I think they were filled by word of mouth because there wasn't any job postings, subdivisional postings. That I was aware of. I don't know how they were filled. It was not until approximately 1977 through my efforts as a Committeeman in that area were jobs posted out in the department itself where the men were aware that certain jobs were available, operators.

Q During the times when there were no postings, how is it determined that an employee got a job that was vacant?

A I believe it was by word of mouth through the shop that there was a vacancy available.

Q Who picked the employee?

A The Foreman.

* * * *

[29.43] [CROSS-EXAMINATION]

Q Mr. Smith, am I correct in saying that the jobs in By-Products, they are now posted when the opening comes up?

A Yes, they are now posted, to my knowledge.

Q And the weekly schedules are now posted; is that right?

A Yes, it is. I still don't know if they have the positions posted on their schedules but they do have a weekly schedule.

Q Was that something that you and Ray Gardner were able to work out with supervision?

A Yes, they—

Q Who is Ray Gardner?

A Ray Gardner is the Committeeman in Zone 1.

Q What is your opinion of the job he does as a Committeeman?

A My opinion of Ray Gardner is very high. Ray Gardner is a good union man, a good man period.

Q Now, take a look at Plaintiffs' 1368, if you will, the [29.44] list of names.

A 1368.

Q Am I right in understanding these are employees that came to you with complaints?

A Yes.

Q They came to you as Shop Steward?

A Yes.

Q And what did you do when these employees came to you as Shop Steward?

A I in turn talked to the Turn Foreman to try to find out the explanation. It was usually after the shift had started in all of these incidents, except Alvin Jones, that is a separate case. They had signed for a posting of different jobs, operating jobs and they wanted to know why they weren't being assigned as the Learner on the job.

Q In each case were you or Ray Gardner ultimately able to resolve the problem that had been brought to you?

A I was not successful. I in turn had to turn it over to Ray Gardner.

Q To your knowledge, was he able to resolve these problems?

A Yes, yes.

Q Am I right in saying that these aren't the only employees in By-Products who had problems of these sorts?

A You are correct.

[29.45] Q Most of the employees had problems at one time or another of this sort; is that right?

A Well, yes, yes. It was quite a bit of problems in By-Products as far as job assignment and who was to fill these assignments.

Q Now, in the Alfred Hicks grievance, the union was arguing that case, Mr. Hicks had not in fact grabbed Mr. Miller; is that right?

A To my knowledge, yes.

Q In your view that was the correct argument to be making, wasn't it?

A Yes, yes.

Q Was Ray Gardner the Committeeman the time that grievance arose?

A Yes.

Q Did you attend the Fourth Step hearing on that grievance?

A No, I did not.

Q Did you attend the arbitration on that grievance?

A No, I did not.

Q Did you talk to Mr. Gardner about what arguments the union would or should be making in that grievance?

A Yes.

Q Now, when Mr. James Brown told you that he thought the petition you were circulating would not be helpful, did you [29.46] think that Mr. Brown was interested in discriminating or hurting Mr. Hicks in any way?

A No. I didn't think of it in that vein.

Q This was just an honest disagreement opinion as to what were the best tactics to use?

A Yes.

Q Would I be correct in saying Mr. Brown was more experienced than you in terms of what works and doesn't work in arbitration cases?

A Not my opinion—rephrase that.

Q Let me ask you: How many arbitrations had you attended as of—

A Maybe three or maybe four. I know of two, possibly another I have attended for my own interest.

Q And for how long were you an Assistant Committeeman?

A Six months, maybe four—four to six months.

Q Did you ever have a chance to attend the Third Step meeting?

A No.

Q How about a Fourth Step meeting? Have you ever had a chance to attend one of those?

A No Fourth Steps. Third Step possibly. I believe I was in with Jim Brown, two times that I recall talking to Sam Miller. So I assume—I believe it was Third Step. I know I had called Jim down and he had come down to By-Products [29.47] while I was the Assistant because of the nature of the Committeeman who was off indefinitely sick and I felt I needed help and at the time I was new.

* * * *

[29.49] [REDIRECT EXAMINATION]

Q Mr. Smith, did you express to union representatives the view as to any other black employee besides Mr. Hicks, the view that the race of the employee had something to do with what was happening to him and that his race should therefore be mentioned in dealings with the company over that employee situation?

MR. SILBERMAN: Objected to as leading.

THE COURT: Overruled.

THE WITNESS: After a period of time in dealing with the individuals.

THE COURT: Just answer the question.

THE WITNESS: Yes, yes, race was a definite factor.

THE COURT: How many times, approximately?

THE WITNESS: Well, seven people's names I can recall specific instances.

THE COURT: All of those seven you expressed the view you thought race was a factor and should be mentioned?

THE WITNESS: No, no, maybe in two—let me see, three of the seven.

THE COURT: Three of them you thought race was a factor. You said that and you urged the union to include [29.50] that in the grievance?

THE WITNESS: I didn't urge them. I felt it could or should—it could have been considered in the grievance if it was so desired to be handled that way.

BY MS. GARTRELL:

Q Did the union agree or disagree with you in those instances?

A Well, I don't believe the grievances were handled on the basis of racial aspect to my knowledge. They were handled on the basis of seniority aspect and the opportunity—let me think now—can't deny the man the opportunity to learn the job.

THE COURT: Do you agree that if you have a clear-cut contract violation that doesn't add anything to add racial discrimination?

THE WITNESS: Pardon?

THE COURT: Do you agree with the position that if you have a fairly clear case of a contract violation involving a grievance that it doesn't add anything to add racial discrimination as well?

THE WITNESS: At that time I did. It seemed to be accepted policy in accomplishing what we wanted to accomplish.

THE COURT: Thank you.

* * * *

[29.154] JAMES BREWER, sworn.

DIRECT EXAMINATION

BY MR. BORISH:

Q Mr. Brewer, by whom are you employed?
A Lukens Steel Company.
Q When—
A 4th day of January, 1951.
Q What is your current position?
A Truck driver, Motor Truck.
Q You are in the Motor Truck Sub-unit?
A That is correct.
Q When did you become a truck driver at Lukens?
A 1969.

* * * *

[29.161] Q What have you observed written on the walls?

A There are a lot of things pertaining to blacks, a lot of different wording pertaining to blacks written on the walls of the bathroom.

THE COURT: Let's not just generalize like that. What time intervals and does the same stuff remain up for any appreciable length of time? When did all this happen?

MR. BORISH: That is coming.
THE COURT: Hurry up.

BY MR. BORISH:

Q When was the last time you had occasion to observe this?

A Monday I was in the bathroom there.

Q Is this something that you just noticed recently or over what period of time have you noticed this?

A Since I have been employed by Lukens Steel Company it has been there.

Q Has it gotten worse or less or stayed the same?

A Just about the same. I would say it is all over.

Q Are you aware of any efforts that the company has made to stop this?

A Yes. About a month ago they did post some literature [29.162] in the clock station and they said this was against Lukens' policy to have these words and different things about blacks. If someone was caught on it they would be disciplined, action would be taken.

Q Before that notice a month ago, were you aware of any efforts by the company to stop this practice?

A I have never seen it posted in the mill.

MR. BORISH: I have nothing further.

THE COURT: Is that generally throughout all the washrooms that you visit or more likely to happen in particular washrooms?

THE WITNESS: It is all over Lukens Steel Company, all over.

THE COURT: Racial epithets on the wall?

THE WITNESS: Yes, sir, Your Honor.

* * * *

[29.164] [CROSS-EXAMINATION]

Q Now, with regard to this graffitti on the bathroom walls, are other things written on the bathroom walls?

A There are a lot of things, mostly pertaining to

blacks, though, what you are reading there. It is not in one washroom. It is all over.

Q Just stuff pertaining to blacks, nothing else?

A No, I didn't say that. I said it is a lot of other things in there, too.

Q Is this graffitti periodically cleaned off?

[29.165] A At times they get someone to repaint it. It is right back up there, I would say, in no time because once you go in—you go in a stall and you close the doors but when you write in there no one can see it. You can't really tell who is doing it.

* * * *

[29.198] JOEL C. KENNEDY, sworn.

DIRECT EXAMINATION

BY MS. GARTRELL:

Q Mr. Kennedy, how long have you been employed at Lukens?

A Since 1956, September 6th.

Q What is your present job?

A Torch Operator in the Strand Cast Department.

* * * *

[29.199] Q Did you apply for the Strand Cast Subdivision when it [29.200] was first opened?

A Yes.

Q Were you approved or disapproved initially?

A I don't know whether I was approved or disapproved. I have never heard it answered. We was never called. I will place it that way. When we tried out why we never got an answer.

Q You never got any answers as to why you were not moved in initially?

MR. LANDIS: Your Honor, I will object to this. This is surely not rebuttal. The designation of the witness says rebuttal to Eugene Lopp and Don Matthews, Joel Kennedy five to ten minutes.

THE COURT: Stretching it beyond ten minutes—

MS. GARTRELL: It will not be beyond ten minutes.
MR. LANDIS: Not rebuttal.

BY MS. GARTRELL:

Q Did Don Matthews ever indicate you or tell you why you did not go into Strand Cast?

A Don Matthews made a statement one time. He never told me direct. He made a statement one time to four employees, one of them was myself that he wasn't going to be a fool and let his best workers go.

[29.201] Q Did you eventually get into Strand Cast?

A Yes, after they had chosen everybody else and they still had openings, then they decided to call us. That was through the work of [Carl] Cannon and Richard Jacks[] and a few other union officials.

* * * *

[29.202] Are you in your rightful place on the seniority list in Strand Cast?

A No, I am not.

Q Have you ever grieved to get in the right place?

A It was our understanding when we got to the Strand [29.203] Cast Department that we couldn't grieve on anything for 180 days after we got there. And we accepted this not knowing that we should have grieved right after we got there.

* * * *

CROSS-EXAMINATION

BY MR. LANDIS:

Q This rightful place business, you went in at the same time that Mr. Middleton did, did you?

A Yes.

Q And Mr. Cannon, was it?

A Mr. Who?

Q Mr. Cannon?

A No.

Q So you went in with Mr. Middleton. Who were the others you went in at that time?

A Mr. Middleton, Mr. Tucker, Mr. Davis, Mr. Sill, S-i-l-l, and myself.

Q And all of you went in at the same time; is that so?

A Yes.

Q So as far as your rightful place in the Strand Cast unit, you were in the same place as those employees who went in at the same time; is that right?

A Yes.

* * * *

[29.206] BY MS. CLARK:

Q Mr. Middleton was a Shop Steward in Hot Tops at the time the Strand Cast controversy was going on?

A Yes.

Q And as your Shop Steward did you understand that he was in contact with management and with union officials about what could be done to try to get you all into Strand Cast?

A Yes.

Q Was it Mr. Middleton who told you that none of you could grieve for 190 days?

THE COURT: 180 days he said.

THE WITNESS: No.

BY MS. CLARK:

Q Who was it that told you about that?

A That is Mr. Pat Palmerella, who was a Trustee, Cannon, Richard Jacks, all of these fellows were Shop Stewards and also James Brown. All of these fellows were officials in the union. They told us we couldn't grieve for 180 days.

Q What was it exactly they told you you couldn't grieve [29.207] about for 180 days?

A The seniority position.

Q Are you sure they didn't tell you it was job description and classification you weren't allowed to grieve about for 180 days?

A No.

Q Is it possible that what they told you was that there was an agreement on job descriptions for 180 days?

A They told us it was an agreement on everything, an agreement made up by the union and officials for the first 16 men who got there.

Q Did you ever see that agreement?

A It wasn't a written agreement. It was a word of mouth agreement.

* * * *

[32.92] THOMAS RYAN, recalled.

DIRECT EXAMINATION

BY MR. LANDIS:

Q Mr. Ryan, back in the summer of 1978, do you remember a protest demonstration that occurred involving people in the Form and Press Products?

A Yes, yes, I do.

Q Did you have some part in dealing with the protest demonstration?

A Yes, I did.

Q Now, will you look at the documents that I gave you there and I will refer you to L-3050. Those are the minutes of the meeting that was held on July 13, 1978; is that right?

A That is correct, sir.

Q Now, before that meeting took place, what was your [32.93] understanding of what brought the whole thing to a head?

A I think the item that brought it to a head was the revision in the incentive standards that the company was contemplating due to the impact of remote control cranes which had been installed in the By-Products Department or Press and Form Department.

Q And what was it that was being contemplated as the result of this new installation?

A There would be a reduction in delay time which the men had been given before which also resulted in a favorable premium opportunity for them.

Q About when was it that this all began to develop?

A Oh, I would say that this started maybe the first of June, it really started to come to a head.

Q As the result of the protest meeting—rather, as the result of the protest demonstration, a meeting was organized with the people present representing the company and then the other people representing the union?

A That is correct, sir.

Q Now, will you just cast your eye over those minutes and tell us how it was that the agenda was arranged for this discussion?

A Well, the agenda was arranged from the petition that had been submitted by the employees. They had, I think, six or seven items. One of the items was as listed in the minutes, [32.94] unjust suspensions and disciplinary actions taken against hourly employees, management impassive concern for hourly employees, and welfare of Lukens and so forth, right on through.

So we used their petition to set the items forth.

Q Does the minutes—do the minutes L-3050 fairly represent what was said in substance about the various items that took place at that meeting on July 13th?

A I believe they do. Our minutes, while they may be set up—initiated by the company, the union usually winds up with a copy of the minutes anyway. But I heard no objection to what was in the minutes.

Q The union representatives were the ones that are set up above there, up in the right hand corner?

A Well, yes, sir. When you say union representatives, there were some officers of the union and there were some employees. There are some employees on that list.

Q Tell us who they were?

A Well, the best of my knowledge, Ben Pilotti, James Brown are officers of the union and Ray Gardner is the Committeeman for that zone that covers By-Products. And I am not sure but I believe Mr. Mayo, Edward Mayo, is a Shop Steward. Cornet Smith, Hicks and Tucker, I believe are employees of the unit.

[32.95] Q Frederick Hicks is Alfred Hicks' brother?

A Yes, sir.

Q Now, following the meeting of July 13th, was there another meeting on July 27th?

A There was.

Q And take a look at L-3050A and say whether or not those minutes reflect what took place in substance at that meeting fairly reflected.

A They do so.

MS. GARTRELL: We do not have a copy of that, Mr. Landis. We did not get 3050A.

MR. LANDIS: You were supposed to have been given a copy of it yesterday when it was—when we got it.

THE COURT: You don't have it?

MS. GARTRELL: We do not have a copy, no, sir.

MR. LANDIS: I beg your pardon. I am sorry. We got it yesterday. I am sorry that it was not given to you.

(Document handed to Ms. Gartrell by Mr. Landis.)

BY MR. LANDIS:

Q Now, I note that Mr. Miller was present at the meeting of July 27th but he wasn't at the meeting of July 13th. Do you remember how that came about?

A He was on vacation at the time of the July 13th [32.96] meeting.

Q In the course of the July 27th meeting did Mr. Miller himself address some of the specifies that were involved about his own handling of the problems there at By-Products?

A Yes, sir, he did.

Q And is that reflected in the minutes?

A That is reflected in the minutes.

Q Following the meeting of July 27th, did the company undertake a series of steps to deal with problems that had arisen there?

A Yes, we did, sir.

Q Will you look at L-3051 and ripple through it and tell us whether that is a series of reports on the various items which arose out of the two conferences of July 13th and July 27th?

A Yes, sir, it is. And it starts with a memo dated August 10, '78. We set up a schedule for the implementation of the request made by the union and the meetings that we held with them.

Q And then it tracks through the various reports dealing with those?

A Yes, sir.

Q Now, in the course of the work that was being done, did you have occasion to write—to follow up on the progress of the work, and I refer you to L-3052? [32.97] A Yes, sir, I did. Most of the problems were within the realm of the operating supervision's ability to adjust. It was my responsibility to see that they did what they were supposed to do and what we said we would do and then this memo of mine dated December 4, '78 showed that there were only a couple of items left that we had not cleared up, that we said we would do for the union.

Q And those were the ones that are referred to in that memorandum to Mr. Fogleman?

A Yes, sir.

Q What about the one that has to do with the Shears personnel? That was your baby, wasn't it?

A That was my problem because it involved the rate paid to the Shear personnel.

Following the initial discussion, which is what, July 13th, I believe, weed out, analyze, take a look again at the Shear rates of pay and he came back and said there isn't anything to adjust. There has been no change.

And consequently there wasn't anything we could do. I wanted to explain that to the Shear crew and to the union, through the union. I tried to do that. I was not successful.

* * * *

[32.98] Q By the early part of 1979, except for the problem that you were talking about in the Shears, which couldn't really be dealt with, was everything wrapped up concerning all the complaints that had arisen out of those two meetings and the petition?

A I certainly believe they were. We never heard anything more from the union about loose ends that had to be cleared up.

* * * *

[32.99] BY MR. SILBERMAN:

Q Mr. Ryan, I believe you referred to something called delay time. Can you explain delay time?

A Not as expertly as I would like.

THE COURT: Which is what we have been experiencing in this trial.

THE WITNESS: Your Honor is probably better than I am.

BY MR. SILBERMAN:

Q My incentive rate hasn't gone down, your Honor.

A When there is delay that the employee is not in control of, he is given an allowance for it.

Q If there was a delay in the time for a crane to come back, a lift, there would be allowance?

A That is right. No penalty for him, that would be an allowance.

Q And the Shears men's complaint was because of the remoting of the crane, there had been a change in the allowance and their incentive pay had gone down?

[32.100] A No. While the remote control cranes had been installed, we kept paying the allowance even though

there may not have been any, they got the allowance in any event.

Now that we had the cranes installed, in our opinion working properly, we were about to revise the standard. This didn't go over so great with the men.

Q Their job class wouldn't be changed, but their take-home pay might be changed?

A It could be, not the job rate.

Q L-3050, minutes of the July 13 meeting, who are the persons listed who are black?

A Mr. Brown, Mr. Hicks, Mr. Mayo and I don't know whether Mr. Tucker is or not.

* * * *

[32.101] Q L-3052 refers to a conversation you had with Jim Brown. Could you elaborate on this conversation?

A Well, as part of my responsibility of the items to be cleared up, from the problems we were having, I was supposed to get after the rate situation, and to do that I had to do it through the union, and so I kept, I guess the word might be hounding Jimmy Brown for a meeting.

He kept avoiding me and finally said let sleeping dogs lie. What I believe he meant by that was we know that the rate, the union knows that the rates are proper and we know that there isn't a thing we can do; there has been no change; we will take it up at negotiations when they come around, which is the proper time to do it.

Q Did you inform Mr. Brown you had had a recheck done on the rates by your expert?

A Yes, sir.

* * * *

[32.102] CROSS-EXAMINATION

BY MS. GARTRELL:

Q How did you wrap or resolve point number four in the petition, Mr. Ryan, which had to do with a claim

that there was a problem with management's continuous effort to create social and racial differences among the hourly employees?

A Well, in that meeting, the union mentioned two specific items. Well, they mentioned A which you see before you, 4A.

Q Which meeting are you referring to?

A July 13. Is that what you asked?

Q You said all of these matters were resolved that had been raised by the petition?

A That is correct.

Q How did you resolve point number four?

A We asked the union what was the problem, and these are the two items we got from them in the meeting of July 13, and if you will note number 4A is a rather indefinite, not a heck of a lot you can do about that—that is something that happened and is gone.

[32.103] Item 4B, the one I have been talking about—excuse me, that is not correct—that appears to be a response from Mr. Miller to the men about their being paid the proper rate.

I wouldn't say it the way it appears that Miller said it, if he said it, but I have a little more experience and I would have said you're being paid the proper rate for the work you are doing.

Q Is that all that was done to resolve point number four as far as you are aware?

A That is correct, that is the only specific items that were mentioned in our meeting.

Q You did not consider point four to be any broader than those two specific items; is that right?

A That is correct.

* * * *

[32.109] MR. SILBERMAN: One further question. When you stated, Mr. Ryan, that you asked the union about certain matters at a meeting, are you referring to the group of employees listed under representing

union, some of them were union officers and some employees?

THE WITNESS: That is correct.

* * * *

[32.141] MICHAEL REACH, recalled.

DIRECT EXAMINATION

* * * *

[32.144] Q Now, let me ask you to take a look at Union-486 which I place in front of you. You signed that agreement; is that correct?

A That is right.

Q Why did the union reach the agreement?

A This concerned the continuous casting operation that was being installed at Lukens at that time. And it was entirely a new operation. The company was not positive as to how it was going to work out, and neither was the union.

So in assigning the men to work on the job, we went along with the company's selection of the men with the understanding that the union or the employees in that area could file grievance at any time retroactive to the start of the agreement.

Q Is this agreement that you wouldn't grieve over job classification right away?

A That is right. We wanted to see the job in operation.

Q You were grievance committee chairman until 1970 when you retired?

[32.145] A That's right.

Q Did the union sign any other agreement other than this one before you, waiving the right or deferring the right to grieve about anything else other than [job classification]?

A Not during the time I was there.

* * * *

[Trial Stipulation Filed in District Court.
Title Omitted in Printing.]

STIPULATION

It is hereby stipulated and agreed among the parties that, if called to testify, John J. Sheehan would testify as follows:

1. I am and since 1965 I have been the Legislative Director of the United Steelworkers of America. Prior to becoming Director I served as a Legislative Representative of the Union in Washington, and in that capacity I participated in the activities of the Union concerning the enactment of Title VII of the Civil Rights Act of 1964.

2. The Union's effort to secure passage of a federal fair employment practices law began long before the bill that eventually became the Civil Rights Act of 1964 was introduced. At the 1960 Democratic and Republican conventions, for example, the Union gave testimony in support of "Program for Civil Rights—1960," a position paper of the Leadership Conference on Civil Rights (of which the Union was a member); that paper, which is Ex. U-684, called for enactment of an FEP law. At the 1962 constitutional convention of the Union, the convention—which is the ultimate policy-making authority in the Union—adopted a resolution committing the Union to supporting the enactment of a federal FEP law; Ex. U-243 contains that resolution and the debate upon it. (In fact, each USWA convention since at least 1950 had endorsed the enactment of a federal FEP law.)

3. The major legislative activity connected with the passage of Title VII came in 1963 and 1964 shortly after the Union had been rebuffed in 1962 by the basic steel

industry in the Union's collective bargaining quest to gain a contractual prohibition of discrimination in hiring and initial assignment. In testimony on July 31, 1963 before the Senate Subcommitee on Employment and Manpower of the Committee on Labor and Public Welfare, the text of which is contained in Def. Ex. U-161, the then-President of the Union, David J. McDonald, spoke of the inability of the Union to prevent such discrimination. Enactment of Title VII, then, was in this particular respect a way to gain by statute rights for employees that could not be won at the bargaining table; and the Union strongly supported the legislation.

4. The Union's efforts in support of the passage of Title VII went far beyond pro forma support. As the contemporaneous documents demonstrate, at several critical stages in the progress of the bill through Congress, the Union committed substantial manpower and time to the effort to enact the bill.

5. At the drafting stage the Union strongly supported the inclusion of an employment discrimination title in the bill. The original Administration bill did not include such a provision, because of a belief that a fair employment bill could not pass Congress. The Administration placed a higher priority on passage of the other titles of the omnibus bill, including public accommodations and voting rights. The Union worked hard to get "a fully enforceable Fair Employment Practices Provision"—i.e., what is now Title VII—made a part of the Civil Rights Bill. Thus, on August 20, 1963, the Union sent out to all District Directors, Staff Representatives, and Local Union Recording Secretaries in the United States the letter that is marked as Def. Ex. U-168 urging all locals to "instruct their members to keep up a steady flow of letters stating the Union's unqualified support" for the inclusion of a fair employment practice title in the civil rights bill.

6. Having contributed to the pressure that got Title VII included in the bill, the Union then worked to ensure that it would not later be dropped from the bill, particularly by those who thought that its inclusion would jeopardize passage of the entire civil rights bill. In this regard, on October 2, 1963, after a subcommittee of the House Judiciary Committee had reported to the full committee a civil rights bill including an FEP title, the Union sent the letter that is marked as Def. Ex. U-169 to all District Directors and Legislative Representatives stating that "it is essential that we give not only acknowledged support but also active support" to the subcommittee bill so that the bill would be "held intact without any dilution." On October 23, 1963 the Executive Board of the Union adopted the resolution that is Ex. U-162 supporting the action of the judiciary subcommittee in incorporating an FEP title into the bill and directing the Union's Legislative Committee and Committee on Civil Rights "to do everything possible" to implement the Union's position that such a bill should be adopted. After the Judiciary Committee reported to the House a bill which included an FEP title, the Legislative Education Committee and the Civil Rights Committee, acting at President McDonald's direction, held a three-day conference in Washington "for the purpose of engaging in active support on Capitol Hill for the legislation"; the directive from President McDonald and the call to the conference are Ex. U-164. In addition, President McDonald sent a letter, Ex. U-163, on November 26, 1963 to all District Directors, staff representatives, and local union presidents, urging the Union's membership to write to their congressmen to ask Congress to stay in session to enact the civil rights bill.

7. At two crucial points in the passage of Title VII and the rest of the Civil Rights Act, the role played by the Union may have been critical to the bill's survival. The first of these came in late 1963 when the House

Rules Committee would not report the bill to the floor of the House. In order to bring the bill up for a vote it was necessary to get 218 Congressmen to sign a discharge petition. The Union contributed considerable manpower and time to the effort to get House members' signatures on the discharge petition. On November 29, 1963, USWA President McDonald directed Legislative Director Frank N. Hoffman to recall the members of the Union Legislative Education Committee to Washington to campaign to have members of Congress sign a discharge petition; the 40-member Committee remained in Washington working for the discharge petition for two weeks. At least two letters, Ex. U-165 and U-166, were sent to all district directors, staff representatives, and local unions during the critical period urging support for the discharge petition. As a result of these efforts, a number of Congressmen pledged to the Union that they would sign the petition.

8. With the help of these efforts of the Union, the discharge campaign was successful, and the bill was reported to the floor of the House, where it was passed. The next crucial stage in the passage of Title VII and the rest of the Civil Rights Act of 1964 came in the Senate. Opponents of the bill launched a filibuster, hoping to repeat the success of previous filibusters against civil rights bills. At least partly as a result of the Union's efforts, cloture was invoked for the first time on a civil rights issue after the filibuster had lasted 57 days. As the cloture vote approached, President McDonald addressed yet another communication to all district directors, staff representatives and local unions urging all members and locals to write to support cloture; the text of this letter is contained in Ex. U-227. Moreover, the Union's Legislative Education Committee was again called back to Washington, this time to lobby for votes in support of the cloture petition. The Union was instrumental in obtaining several votes for cloture which

might well have been lost but for the Union's efforts, as reported in Ex. U-170.

9. Thus, the Union unquestionably played a critical role in securing the enactment of Title VII. Representatives from local unions in Steelworkers District 7 made major contributions to the Union's efforts. During the filibuster in the Senate, the District's Legislative Conference convened in Washington. Representatives from local unions in the District met first to be briefed on the progress of the bill and on how they could help. Then we sent them into the House and Senate offices to speak with their Senators and Congressmen personally and urge support of the bill. Def. Ex. U-171 reflects these efforts. Other districts similarly sent their legislative conferences to Washington to provide support at crucial stages of the legislative battle.

10. Much of the Union's work in support of Title VII was coordinated with the activities of the Leadership Conference on Civil Rights, a coalition of labor, religious, and civil rights organizations. The Union was an active participant in the Leadership Conference, and a major financial contributor. As a Steelworker member of the Leadership Conference I took part in a number of civil rights activities in addition to my work in support of Title VII. For example, I and other members of the Steelworkers' staff marched, together with other Leadership Conference members, in civil rights marches in the South which were taking place before and after the legislative activity regarding Title VII. One of the marches in which I and other Union representatives participated was the famous march with the Reverend Martin Luther King from Selma, Alabama to Montgomery; the report of this march in the USWA newspaper *Steel Labor* has been marked as Def. Ex. U-172. The Union also was well represented at the March on Washington in August, 1963; Ex. U-226 is the *Steel Labor* report of that march. As these facts illustrate, the Union's work in support of

Title VII was only one manifestation of its commitment to civil rights and equal opportunity.

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Attorney for Defendant Unions

/s/ William H. Ewing
Attorney for the Plaintiffs

/s/ Robert M. Landis
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(6) (6)

Nos. 85-1626 and 85-2010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES GOODMAN, *et al.*,
Petitioners,

v.

LUKENS STEEL COMPANY, *et al.*,
Respondents.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, *et al.*,
Petitioners,

v.

CHARLES GOODMAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

(Volume II, Pp. 321-732)

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EXCERPTS FROM EXHIBITS ADMITTED INTO EVIDENCE IN THE DISTRICT COURT

PLAINTIFF'S EXHIBIT 15

SUPPLEMENTAL AGREEMENT ON TRADE AND CRAFT JOBS IN ACCORDANCE WITH THE AGREEMENT DATED OCTOBER 20, 1965

1. The provisions of this agreement shall become effective on January 1, 1966 and shall continue in effect during the term of the basic Labor Agreement dated October 20, 1965.

2. (a) The job classification of each Trade and Craft job listed in Appendix A hereto shall be increased by adding to the present numerical classification in Factor 7 a separately identified Trade and Craft convention of 2.0.

(b) The job class of any related job which requires the skills of a fully qualified craftsman shall be increased two job classes on a negotiated basis. (Examples of jobs covered by this provision are given in Appendix B hereto).

3. A Millwright or Motor Inspector job shall be a job which on December 31, 1965:

(a) was identified by one of such titles; or

(b) consisted of duties substantially the same as those identified by the title of Millwright or Motor Inspector in the Manual.

4. An employee who on December 31, 1965, is a regular incumbent of a job covered by paragraph 3 shall be slotted as of January 1, 1966, in a Millwright or Motor Inspector job in the following manner:

(a) An employee who at any time during the six consecutive calendar months ending December 31, 1965, was a regular incumbent of a Millwright or Motor Inspector job or a job of equal job class to which subparagraph 3(b) applies shall be slotted in Grade A (in the standard rate of the applicable Trade and Craft job); and

(b) An employee who at any time during that period was a regular incumbent in Grade A of a standard job class 12 (Mechanical or Electrical) Repairman job to which subparagraph 3(b) applies shall be slotted in Grade B (in the intermediate rate of the applicable Trade and Craft job); and

(c) An employee who at any time during that period was a regular incumbent in Grade B or C of a standard job class 12 (Mechanical or Electrical) Repairman job to which subparagraph 3(b) applies shall be slotted in Grade C (in the starting rate of the applicable Trade and Craft job).

5. Existing practices in respect of demotion from Trade and Craft jobs (including those practices which govern Millwright and Motor Inspector jobs as defined in paragraph 3) to jobs of lower job classes in connection with the decreasing of the working force shall continue in effect. However, an employee who has qualified as a craftsman and who is demoted from a Trade and Craft job in connection with a force reduction may thereafter fill a vacancy in the craft for which he is qualified without further determination of his qualifications.

6. On or after January 1, 1966:

(a) An employee who is not covered by paragraph 4 whose service has not been broken on or after July 1, 1965, and who is entitled to fill a vacancy in a Millwright or Motor Inspector job shall be deemed to be a qualified craftsman, if during the period from July 1 to and including December 31, 1965, he was at any time a regular

incumbent of a job covered by paragraph 3. He shall be slotted in the appropriate Trade and Craft grade in the manner specified in paragraph 4.

(b) An employee, other than an employee covered by subparagraph (a), whall be eligible to fill a permanent vacancy only if he has qualified as a craftsman in accordance with the arrangements referred to in subparagraph 7(a).

(c) If a temporary vacancy cannot be filled by an employee who has qualified as a craftsman in accordance with paragraph 4 or subparagraph 6(a) or 7(a), an employee who has not qualified as a craftsman may fill a temporary vacancy in a Millwright or Motor Inspector job. In that case, he shall be temporarily classified as a Millwright C or a Motor Inspector C, but he shall not be considered a craftsman until the Management has determined he has qualified in accordance with subparagraph 7(a).

7. (a) The arrangements heretofore in effect for entrance into a craft job shall continue in effect and similar arrangements shall be established for Millwright and Motor Inspector jobs.

(b) The established arrangements for advancement within a craft shall apply to an employee assigned to Grade B (intermediate rate) or Grade C (starting rate) of a Millwright or Motor Inspector job. The regular interval(s) of 1040 hours for advancement within a craft shall commence on January 1, 1966, for employees slotted in accordance with subparagraphs 4(b) and 4(c).

8. The Company as of the date of this agreement does not intend to establish Gang Leader jobs for the Millwright and Motor Inspector jobs, although it reserves the right to do so. If such jobs are established the Company will comply with the provisions of the basic Labor Agreement.

9. The Company and the Union agree that the job of Sheeter (2315-512) will be upgraded two job classes in view of the extenuating circumstances that exist in the Sheet-Tin-Paint seniority unit. The Union further agrees not to use this instance as a precedent or support of its position in any disputes it may have with the Company regarding the upgrading of any other job(s) not covered by this agreement.

10. Employees slotted in accordance with subparagraph 4(b) and 4(c) and those covered by paragraph 9 will be paid the assigned rates retroactively to January 1, 1966.

(a) The standard hourly wage rates, incentive calculation rates, hourly additives, and trade and craft additive for the Trade and Craft jobs of Millwright or Motor Inspector are those listed below:

		Effective January 1, 1966			
		Non-Incentive	Incentive		
	Job Class	Appendix A Standard Hourly Wage Rate	Standard Hourly Wage Rate	Hourly Additive	Trade or Craft Additive
Millwright or Motor Inspector			(Incentive) (Calculation Rate)		
Standard	16	$3.407	$2.94	$.321	$.146
Intermediate	14	3.261	2.80	.315	.146
Starting	12	3.115	2.66	.309	.146
		Effective August 1, 1967			
Millwright or Motor Inspector					
Standard	16	$3.495	$2.94	$.405	$.150
Intermediate	14	3.345	2.80	.395	.150
Starting	12	3.195	2.66	.385	.150

(b) The standard hourly wage rates, incentive calculation rates and hourly additives as negotiated for the job of Sheeter are listed below:

		Non-Incentive	Incentive		
	Job Class	Appendix Standard Hourly Wage Rate	Standard Hourly Wage Rate	Hourly Additive	Negotiated Additive
		Effective January 1, 1966			
Sheeter	13	$3.188	$2.730	$.312	$.146
		Effective August 1, 1967			
Sheeter	13	$3.270	$2.730	$.390	$.150

11. The Company, as of the date of this agreement, does not intend to establish apprentice jobs in the Millwright or Motor Inspector jobs, although it reserves the right to do so. If such jobs are established, the Company will comply with the provisions of the basic Labor Agreement.

APPENDIX A

TRADE AND CRAFT JOBS

Blacksmith

Bricklayer

Carpenter

Electrician (Armature Winder)

Electrician (Lineman)

Electrician (Miscellaneous)

Electrician (Shop)

Electrician (Wireman)

Electronic Repairman

Instrument Repairman

Machinist

Millwright

Motor Inspector

Painter

Patternmaker

Pipefitter

Plumber

Rigger

Welder

APPENDIX B

RELATED JOBS

Combustion Man

Forgeman

Vacation scheduling for all types of vacations shall be administered as if separate Seniority Subdivisions still exist.

This Agreement applies only to the situation outlined herein and in no other way alters or amends the current basic Labor Agreement.

LUKENS STEEL COMPANY	UNITED STEELWORKERS OF AMERICA
by:	by:

[Signatures Omitted in Printing]

Date: February 24, 1966

PLAINTIFF'S EXHIBIT 28

Copeland, C. T. and Gary, W. H. Abstract of an Analysis of the Wonderlic Personnel Test as a Predictor of Job Success Among Three Employee Performance Groups.

As a result of the controversy throughout the nation by government, industry and labor union officials over use of psychological tests in employment practices a validation study of the Wonderlic Personnel Test was undertaken to determine its performance as a selection device at Lukens Steel Company.

Three separate sample groups of employees: present foremen, present bargaining unit personnel, and terminated employees, were examined to determine their performance on the Wonderlic Personnel Test and on five (5) measures of apparent job success. Each employee group was analyzed and the three (3) groups were compared in terms of their performance. Correlations were made between the Wonderlic and the five (5) job success criterion to determine the amount of significant association within each group, a multiple regression analysis was made to determine how well the Wonderlic predicted these success criterion, and an Analysis of Variance was completed on the three (3) employee groups to determine whether they were different in terms of their Wonderlic scores.

The results of this study indicated very low correlations in the main between the Wonderlic Personnel Test and the five (5) success criterion. The study also showed extremely poor predictability on the part of the Wonderlic in determining later job success measures. The exceptions to these findings were explained as occurring due to criterion contamination as a result of already existing selection procedures, and also because of the lack of variation in many of the measures. The fact that the Wonderlic's prediction performance measured on its abil-

ity to predict specific criterion scores rather than a range of scores also was a factor in the low correlations. The authors felt that the reasons for the low correlations cancelled themselves out, however, and that the Wonderlic's performance in association and prediction did not meet the requirements of a professional selection instrument.

The analysis of variance made to determine whether or not differences existed among the three (3) groups found that indeed such difference did exist. The direction of difference between the second and the third group, however, was opposite that of the test publishers' assumptions thereby supporting the authors' contention that the results of this part of the Analysis was due to present select procedures contaminating selection of the groups being analyzed.

Conclusions drawn by the authors, that the Wonderlic is a relatively ineffective selection devise in terms of its present use in predicting job success and in its association with job success criterion, were augmented by the writers' recommendations for further research activities that would shed even more light on the findings revealed in this study.

PLANTIFF'S EXHIBIT 29

September 20, 1968

SUBJECT: Wonderlic Personnel Test—Validation Study

TO: N. J. Domangue—Manager, Personnel Administration

FROM: J. A. Hall—Employment Manager

Attached is the report of preliminary study conducted by the Employment Department to determine the validity of the Wonderlic Personnel Test for proper selection and placement of hourly employees at Lukens.

Since we did not wish to "advertise" our efforts to the hourly workforce and Union officials, this study was based on personnel information presently on record and no attempt was made to contact employees to solicit additional data. The results and conclusions, therefore, are open to some criticism. However, the "weight of evidence" seems to be of sufficient magnitude to generally support the conclusions in the study and therefore provide a basis for determining what course of action we should now take in regard to our testing program.

Based on the results of this study, it appears we are unable to support the Wonderlic Personnel Test as a valid selection and placement tool for hourly personnel. Consequently, we are now at a point where we must expand our test research efforts in an attempt to develop a valid battery which, as you know, is a major undertaking. Further, it is particularly demanding at this time because we have to work against deadlines imposed by the federal government and contract commitments to the Union, and must be able to prove statistically the validity of a test battery in relationship to each hourly position or "family" of positions. In addition, such a battery

must meet several other rather stringent standards required by the federal government.

Accordingly, I think it is necessary that we hire a consultant who has "expert" knowledge of psychological testing in industry to help us in the development of an appropriate test battery. Although we possess the capability of performing this job ourselves, such a consultant should be able to provide expert guidance in such matters as validity studies on tests used by other firms, statistical techniques, construction of criterion measures, etc., and thereby shorten up the time usually required for such a major task.

I would like to discuss this study with you after you have had an opportunity to digest the information.

An additional copy of the report is attached for your possible distribution to Mr. Irwin.

PLAINTIFF'S EXHIBIT 57

July 5, 1949

Mr. Charles Kovacs, National Rep.
United Steelworkers of America (CIO)
147 East Chestnut Street
Coatesville, Pennsylvania

Dear Mr. Kovacs: Employees with Fifteen (15) Years or more Company Service who have Currently or will Subsequently Present Placement Problems

In accordance with our recent discussion of the above-mentioned subject and your request at that time, we are submitting herewith a list of those employees who have either already presented placement problems or who may at any time in the near future give rise to such problems. We must again request that you give serious consideration to our proposal as presented in a meeting held on June 9, 1949 concerning the establishment of a so-called Labor Pool. Immediate action should be taken to provide employment security with this Company for those long-service employees, most of whom, if subject to layoff at this time or subsequently currently have no basis for a job claim under the present seniority setup.

Very truly yours,
LUKENS STEEL COMPANY

/s/ Wm. C. Robinson
WM. C. ROBINSON
Asst. Director of
Industrial Relations

WCR:cpb
Enc.

CC: Mr. M. Reach, President Local #1165
Mr. V. Greenley, Chrm. Griev. Com. Local #1165

Bargaining Unit Employees with 15 or More Years
Their Present Seniority Lists Who Will Present Pl
These

Ck. #	Name	Age	Pos. #	Company Serv. Date	Seniorit Company
ALLOY DEPARTMENT					
2851	Harry Willis	37	013	8-17-33	5717

Willis, formerly employed in the Universal Rolling M
on the lay off list but can not perform heavy manual

FUEL & STEAM—Oil Pumping Station					
4526	F. H. Dorsheimer	44	111	3-20-23	9547

Dorsheimer has 26 years of service and he has an
formerly worked in the U. M. but was employed on t
that he was white he was not considered for placem
Labor Gang. It is our suggestion that due to the p
service in the 140" Labor Gang to protect him for t

Company Service Who Appear In The Lower Brackets of June 22, 1949
cement Problems in The Event of Additional Cutbacks in
Departments

as of 5/15/49		Other Seniority			Pos. on Seniority List in Relation to
Dept.	Sub-Div.	Amount	Dept.	Claim	Last Man as of 6/22/49
1317	1317	66	140" Labor	No	1
		4334	UM Rolling	No	
		4400	Total		

ill now working in the Alloy Department is the first man
labor due to the amputation of one hand.

* *

840	840	61	Const.-Lab.		1
		180	Cladding	No	
		165	140" Roll.	No	
		57	140" Head Mach.	No	
		6	140" Labor	No	
		8238	Univ. Mill (Closed)		
		8707	Total		

nfortunate circumstance which should be cleared up. He
e Shears and when the Mill closed down, due to the fact
nt on the Shears and other Mills but went to the 140"
culiar circumstances that he be given credit for his U. M.
e future.

* *

/s/ Charles R. Vandever

PLAINTIFF'S EXHIBIT 60

February 18, 1965

Mr. T. J. Ryan
Manager—Labor Relations

SENIORITY UNITS

There are 74 Seniority Subdivisions that make up the bargaining unit at Lukens Steel Company. Seven of these units are doomed to extinction since they are frozen. Of the 67 Seniority Subdivisions which will survive, 21 contain jobs which are rated at no higher than Job Class 8.

Lukens has spent much time and money on promoting "craftsmanship." The common image of the meaning of this word is the gradual development of a workman through a life or, at least, a career of increasing skill, knowledge, responsibility and pride of accomplishment. How can anyone expect any real results from attempts to stimulate Craftsmanship when the top job to which many can aspire is Job Class 8 or less?

It is a known fact that Lukens discriminated on the basis of color in the past when hiring employees for various Seniority Subdivisions. These acts of discrimination will remain facts until the employees, hired then, die, retire or quit. To refrain from actively seeking seniority realignments, where possible, to wipe out the shadows of past discrimination is to deny opportunity to older employees and extend opportunity to younger employees.

Seniority appears to me much as the weather appeared to Mark Twain when he said that everybody complains about it, but no one does anything about it. With 67 Seniority Subdivisions, we have 67 impenetrable walls dividing our work force. No one can argue that fewer seniority units would permit management more flexibility. What stands in the way of larger Seniority Sub-

divisions? Certainly not the inability to manage large seniority units. Today the six largest seniority units contain over 1,200 employees, or less than 10% of the seniority units contain almost 35% of the work force. With about 10% of the work force in the seniority pool, we realize that the balance, or 65% of the work force, is contained in 61 seniority units; or slightly over 1% per unit. Ability to manage needs not act as a bar to larger units.

Larger units have other advantages. Since vacations are scheduled by seniority units the larger units have a more level vacation load. Small units permit bunching of vacations in the summer time. Large seniority units permit a single employee to establish himself in a steady job. We have crane runners (our largest seniority unit) who have never been laid off. Large seniority units can't guarantee employment stability, but attrition numbers in large units are bigger than those in a small unit. This results in a given employee spending less time before he has a steady job.

Management should accept the challenge of convincing employees that larger seniority units have advantages in terms of job security, promotional opportunity and a chance to grow in their jobs through a lifelong career.

J. E. Muhs

Assistant Manager—Labor Relations

PLAINTIFF'S EXHIBIT 62

September 21, 1970

POSSIBLE COMBINATIONS OF SENIORITY UNITS

Industrial management generally conducts itself with respect to seniority in the same manner that Mark Twain claimed people reacted to the weather when he wrote "Everybody complains about the weather, but nobody does anything about it." Of course, one essential ingredient of any seniority system is stability—a seniority system which changes often is no seniority system at all.

We are inclined to think that the seniority system is a property of the hourly worker and management's role is to follow the system. The base of the seniority system is the subdivisional jurisdiction. These jurisdictional lines are drawn along a pattern which management established in grouping tasks into jobs and jobs into departments. Therefore, it can be argued that as management concepts change, the basic seniority jurisdictional alignment should change also.

The history of seniority subdivisions at Lukens shows that already significant progress has been made toward combining seniority units. Beginning with 75 seniority units some years ago, we find that two new units have been created, namely, Vertical Blasting and Strand Casting. During the same period of time, four seniority units have been frozen and are on their way to extinction (Engineers, Pressed and Formed Electrical Maintenance, Flame Cut Electrical Maintenance, and the Roll Shop). Another four units have been frozen and blocked (Welded Products Maintenance, Pressed and Formed Mechanical Maintenance, O.H. Maintenance-Repairmen, and O.H. Maintenance-Pipefitters) and are thereby in limbo and will no longer exist some day. This leaves 69 seniority

units which will remain forever unless agreement to change is achieved.

Why should this long-term trend be accelerated and more combinations effected in coming years?

First, we should examine the Standard Hourly Wage Scale. When first established on June 15, 1947, the rate of Job Class 24 (the highest job at Lukens) was more than 82% higher than Job Class 2, the lowest job at Lukens.

As of August 1, 1970, Job Class 24 was less than 65% higher than Job Class 2. In 1947, moving from Job Class 9 to Job Class 10 represented a 3% increase—today that same move results in a 2.5% increase. In a day when incentive premium pay-offs of 10% to 15% are coming under attack, it is no wonder that many employees are not attracted to higher class jobs. The increase in income is not felt to be worth the increases in responsibility or skill requirements.

The Job Class 2 rate has increased 170% over the years while the rate for Job Class 24 has increased only 145%. All this happened while the increment between job classes increased only 112%.

This deterioriation of the Standard Hourly Wage Scale job class relationship or "compression" as it is often called, reduces the already small promotional opportunity in many subdivisions to insignificance. The compression trend will continue and Lukens could not achieve a deviation from the Standard Hourly Wage Scale.

The combination of seniority units would lessen this problem by providing a longer promotional sequence in each seniority unit and would enable the highest paying job in the unit to pay significantly more than the lowest paying job in the same unit. The combination of seniority units appears to be, at this time, the only reasonable way to lessen the effects of compression.

The successful business today and tomorrow will be the business which possesses the flexibility and takes advantage of that flexibility to adapt to the many changes occurring at an increasing rate. It is appropriate that Lukens' management should thoroughly plan for and achieve the removal of situations which restrict that flexibility. One of the sacred cows of unionism, which is restrictive to management, is the crossing of seniority lines, either in short-term assignment of work or the long-term combining of jobs or tasks. Management has been so uniformly unsuccessful in overturning the sacredness of seniority lines that very little thought is expended in developing changes which involve crossing of seniority lines. If seniority lines cannot be crossed, every effort should be expended to remove them, or at least reduce them in number. Management flexibility varies inversely with the number of seniority divisions.

Sheer size of seniority unit is not a limiting factor. With approximately 70-odd seniority units at Lukens, the average population per seniority unit is about 50 employees. The largest single seniority unit at Lukens is the Cranes Seniority Subdivision of the Electrical Department, which for the last several years has contained approximately 360 employees, or over 10% of the bargaining unit. It is conceivable that operations could be conducted with the present bargaining unit divided into no more than ten seniority subdivisions. Nothing like this is suggested in the present proposal. The present proposal does suggest the possibility of removing half of the present seniority division lines, which would bring the average number of employees per seniority unit to 100, with no one unit exceeding the Cranes Subdivision in size. Following the inverse rule, if the number of seniority subdivisions were reduced by 50%, management's flexibility would be increased by 100%.

With a little imagination, it is easy to see what larger subdivisions could do by way of increasing management's

flexibility. What would larger subdivisions do for the bargaining unit employee? Modern behavioral scientists tell us that men usually begin work for the purpose of making money. The basic wage rate structure at Lukens makes it possible to satisfy this need immediately upon hiring. The second objective of the working man is to stabilize the regularity of his income, or in other words, he seeks job security. In a larger seniority subdivision, a single employee achieves a higher degree of security in a shorter amount of time. It should be obvious that an employee is going to achieve job security faster in a large subdivision where the rate of attrition is five employees per year than in a small subdivision where the rate of attrition is one employee every five years. We are inclined to think of a seniority system as one in which relative seniority standing is the most important factor, but many working men place a lot of value on their absolute standing in the seniority ranks. Speaking relatively, there is no difference between being the bottom man on a five-man seniority list and being the 20th from the bottom on a 100-man seniority list. In absolute terms, however, being 20th from the bottom in a 100-man unit is looked upon by most men as being a far greater degree of job security than being the bottom man in a five-man seniority unit. With job security being established more rapidly, the employee can turn earlier to other, more meaningful goals.

The behaviorists tell us that a good climate for motivating people is one in which mental and/or psychological growth can take place. With fewer subdivisions, there would be more jobs and a greater variety of jobs in any one subdivision. This would permit an employee to use his ever increasing seniority status to expose himself to new tasks to a much greater degree than is now possible. As a case in point, let's look at the 140"-206" Scale Seniority Subdivision where we have two jobs—2nd Recorder, Job Class 6, and 1st Recorder, Job Class 8. It

is difficult to imagine how anyone can be expected to regard 17 years as a 2nd Recorder followed by 18 years as a 1st Recorder as being a meaningful career in which there is sufficient opportunity for psychological growth. This point can be made even more strongly by looking at the Stockyards Subdivision of the Melting Department. The job of Electric Furnace Weigher in Job Class 8 is now the only job in this subdivision. Within the salary ranks, management prides itself in the number of promotions and transfers made to and among unrelated jobs. Foreman training is done in a general manner that would permit a foreman to become a good foreman in any department. To continue applying a different philosophy to bargaining unit workers which restricts them from occupying a number of different jobs during the course of a career only serves to widen the gap between management and labor and fails to tap the one resource that can help keep Lukens superior to its competition. With larger subdivisions containing a larger variety of jobs in each subdivision, there would be more possibility for job enrichment or job enlargement. Although such things as job enrichment and job enlargement are embarked upon to benefit the Company, such programs are of great benefit to employees most of the time.

In a larger subdivision having a greater variety of jobs, there is more opportunity and it is generally easier to find the "best fit" among the jobs and people available. Where there is only a little opportunity, employees tend to want to make the most of their seniority to claim that limited opportunity. In larger subdivisions, there are proportionately more promotions which are not in strict seniority order.

One could argue that if an hourly worker wants to grow psychologically and add variety to his career and seek a higher rate of pay, he is always free to put in a request for transfer. The fallacy of this argument lies in the

fact that many employees, after establishing seniority in one seniority unit, are reluctant to transfer to another seniority unit where they have to start all over again. While it is true that they retain rights in their former unit, which is an unusual feature of Lukens' seniority system, a transferring employee must go through a process in which his seniority in his former unit becomes diluted while he is building up seniority in a new unit. This is a chance that very few people want to take, especially the older or experienced, more skilled workers who have substantial seniority investment in a particular subdivision.

Another advantage of larger seniority subdivisions containing a wider variety of jobs would be the overcoming of the residue of past racial discrimination hiring practices which are today being preserved in our present seniority structure. Efforts to overcome the one-sided racial composition of many of our seniority units by hiring people of the opposite race have not been highly successful. Seniority subdivisions which have been predominately white or predominately black still contain this predominance despite efforts to change the situation. Initially, this advantage would accrue to the minority group members of the bargaining unit, but eventually the advantage would be enjoyed by all of the hourly work force.

There are some other advantages which management would find helpful. For instance, in the area of vacations which are scheduled by subdivision. The reduction in the number of subdivisions would result in less summer bunching and more spreading of vacations through the year. All vacation replacement opportunities would be of longer duration. If the process by which larger subdivisions were achieved would be an evolutionary process, it would be some time before this advantage would take effect. But, unless the subdivisions are made larger, it will never take effect.

There are some other considerations which on the surface appear to be disadvantages, but which in truth could be advantageous. With fewer subdivisions, the weekly scheduling of manpower would be concentrated among fewer schedulers and would be more complex. The use of the computer in producing the weekly manpower schedule has been accomplished for two subdivisions to date and a third subdivision is being programmed. The results have been good. Supervision spends fewer manhours on the weekly jigsaw puzzle and schedules have more consistency built in to them. In areas where the weekly manpower scheduling has been computerized, there are fewer complaints about the schedules and the employees feel that they are being dealt with more fairly.

With larger subdivisions containing more jobs, we will no longer be able to rely on the "rub-off" over a long number of years as the means by which a man becomes trained for his next job. This will require a sharper definition of job requirements and better measures of employee qualifications. Training requirements will increase and the quality and efficiency of training will have to be increased. There is more evidence every day pointing to increased needs for training both in terms of quality of training and efficiency of training. We are going to have to meet these needs even if we do not have larger seniority units. The presence of larger seniority units would merely challenge us to bring about better and more efficient training techniques earlier. We cannot afford to wait if we are going to remain better than our competitors.

The cost of bringing about larger seniority subdivisions can only be measured in terms of manhours of planning and persuasion. There is no denying that this cost could be substantial, but the rewards through increased stability, and to truly motivate people through greater work satisfaction are greater by far.

JEM

PLAINTIFF'S EXHIBIT 65

Civil Rights Committee Meeting
October 15, 1970 3:00-5:00 P.M.
Industrial Relations Conference Room

Personnel Present	*Company Representatives*	*Union Representatives*
	Thomas J. Ryan	Carl Cannon, Chairman
	William H. Gary	Harry Cavuto
	Carl Fernandez	James M. Quinn, Jr.
	Thomas P. Scull	
	Paul Geiswite	
	James A. Hall, Jr.	
	John E. Muhs	
	Norris J. Domangue, Jr.	
	Leonard M. Eaton	

A special meeting of the committee as called to order for the express purpose of discussing the recent official visit of the Office of Federal Contract Compliance.

Mr. James Hall began the discussion by discribing three of the agenices which are leaders in the area of eliminating discrimination.

He spoke first of the Human Relation Commission in Harrisburg to which individuals may lodge complaints. Inspectors from the commission may be directed to visit an involved firm in order to conduct an investigation. Company records and other information must be made available to these inspectors upon request. Briefly touched upon was the Federal Equal Employment Opportunity Commission. He described the Office of Federal Contract Compliance which provides guidelines and regulations to cover firms that do business with the government. Lukens is one of these firms and must abide by the rules and regulations established by the Office of Federal Contract Compliance.

A response to the O.F.C.C. rules and regulations has been an execution order interpreted to mean that all firms which do business with the government must make a concentrated effort to remedy any areas of under utilization of minority groups.

Most reecntly the O.F.C.C. made a complete and thorough investigation of Lukens to determine if they were in compliance with all O.F.C.C. rules and regulations. Firms which do not meet the standards expected of them may be issued a "Show Cause" letter requiring them to give reasons why Federal Contracts should not be taken away.

Lukens was informed verbally that the firm is substantially in compliance with all rules and regulations. The O.F.C.C. did make certain recommendations that Lukens is expected to comply with during the next year. Officials in Washington will study the report of the investigators and advise the company of any changes or additions to the recommendations.

The company is responsible for setting goals to achieve the recommendations and taking affirmative action to bring them about.

It is expected that officials from the O.F.C.C. will return in about a year to investigate Lukens and determine whether or not the necessary affirmative action has been taken.

Mr. Thomas Ryan spoke of the developemnt of the seniority system through the years, explaining how certain discriminatory practices have evolved over a period of time.

Mr. James Quinn questioned the recommendations of the O.F.C.C. He, quite frankly, wanted to know whether the recommendations have the force of law or not?

Mr. Hall explained, that a great deal depended upon the action taken by a company, to achieve progress in the recommended areas; as to how much pressure the government wished to bring to bear to achieve its program.

Mr. Harry Cavuto asked if the Union and the Company both could be brought to task in situations where the Company failed to make progress.

Mr. Carl Fernandez cited certain cases where aggrieved persons had filed suit under the 1964 Civil Rights Act against both the Union and the Company for perpetuating discriminatory divisions. The Philip Morris case was mentioned as an example where a plant wide seniority system was established in order to properly integrate the firm. Mr. Fernandez emphasized that, unfortunately, the departmental seniority system lends itself to defacto segregation.

Mr. Muhs emphasized that consideration should be given to merging subdivision units. By combining many of the smaller subdivisions, new units could be formed that have several job classifications. This would provide the individual employee with a far better opportunity for advancement and a definite career pattern could be established. At the same time mergers would serve to integrate many of the separate Black and White subdivisions.

Mr. Cavuto asked if the company was already following a policy of hiring Blacks into all White subdivisions?

Mr. Hall agreed that this was true but that the O.F.C.C. wanted to know what will be done for those persons already employed by the firm. He went on to state that Lukens desires to settle these issues outside of court in order to avoid having a third party, a judge, make the decisions which will affect the welfare of employees at Lukens Steel Company.

Mr. Quinn asked what Lukens was doing at present in the way of affirmative action.

Mr. Hall explained as an example, that officials of the personnel department were working with high school

counselors to guide Black girls and boys to take clerical courses in high school so that they will have the requisite skills upon graduation that Lukens needs.

Mr. Cavuto stated that it was extremely difficult for him to consider mergers of any type as they would have an adverse effect on vacation preference and the entire seniority structure which he adamantly supports.

Mr. Muhs cited the example of the Conductors and the Engineers where a successful merger has been carried out without any loss of vacation preference or seniority.

Mr. Thomas Ryan suggested that a subcommittee of the Civil Rights Committee be formed to thrash out what possible alternatives exist for improving the seniority subdivision system in order to conform with the recommendations forwarded by the office of Federal Contract Compliance. Members of the subcommittee would be asked to report their findings to both the Union and the Company.

Mr. Cavuto asked everybody to understand that these meetings were not to be construed as support of any Union-Company agreement and that no agreements affecting the Union would be made for the present by the Civil Rights Committee.

Mr. James Hall reemphasized that the timing is very important for setting up the goals in these areas, because the O.F.C.C. will most definitely be returning next year to adjudge Lukens efforts to comply with their recommendations in an affirmative manner. He went on to say that both Company and Union must understand that both have an increased obligation to abide by the government rules and regulations in these areas or suffer the penalty.

/s/ Leonard M. Eaton
LEONARD M. EATON
Secretary

PLAINTIFF'S EXHIBIT 70

December 23, 1971

Mr. J. F. Mulligan, Co-Chairman
Civil Rights Committee

SUBJECT: Status Report—Efforts of the Company Members of the Civil Rights Sub-Committee

Dear Jim:

At the Civil Rights Committee Meeting of October 20, 1971, I reported on behalf of the Sub-Committee that no progress had been made since the last meeting of the Sub-Committee on June 10, 1971. The Committee agreed to require a bimonthly report of progress from the Sub-Committee. In an attempt to schedule a meeting of the Sub-Committee for Thursday, December 9, 1971, James Brown, the Union Co-Chairman of the Sub-Committee was contacted and agreed to meet on December 16, 1971. On December 2, 1971, Mr. Brown informed me that President Cavuto would not permit the Union members of the Sub-Committee to engage in any related activities because of the Company's attitude concerning manning of the new ESR facilities. This series of events was reported at the December 15, 1971, Civil Rights Committee Meeting.

The original objective of the Sub-Committee "to meet and discuss rearrangements of seniority units in a manner agreed to by the parties" appears to be unattainable, at least temporarily. The progress being made in eliciting a fully cooperative effort from the Union is almost nil. The present refusal on the part of the Union to meet should not be responded to with equal refusal by the Company. Almost uniformly in the past, seniority rearrangements have been achieved by the Company presenting a rather fixed concept of what the rearrangement

should be and then negotiations with the Union have worked out the mechanics. The recent turn of events permits the Company to assume the posture of continuing to work on the conceptual framework of a seniority rearrangement and when the Union is ready to meet again, we can probably start off with the mechanics of such rearrangement.

To this end, the Company members of the Civil Rights Sub-Committee intend to continue to meet with the objective of outlining three "grades" or methods of seniority rearrangement. The first method will embody the most radical changes when compared to our present system; the second method will be based on more moderate changes relative to our present system and the third will seek to accomplish our seniority rearrangement objectives with the least change to our present system.

The basic objective is "to afford greater opportunity and job enrichment for employees" as officially stated in the February 3, 1971, Memorandum of Understanding and unofficially to overcome the remnants of past discrimination still preserved by our current seniority system thereby preventing the possibility of governmental-judicial rearrangement of the seniority system by edict.

Above and beyond these objectives, why should Lukens want to achieve a rearrangement of its seniority system?

1. Increased flexibility—This phrase is voiced so often at Lukens that it has become rather trite; one wonders if anyone is serious about it. Experience has shown that flexibility is limited. In the case of the two most recent manufacturing innovations, Strand Casting and ESR, the only answer has been to establish two new seniority jurisdictions to accommodate the manpower selected from a broad base of applicants. These new subdivisions on top of 75 already existing seniority units plus seven seniority pool divisions is not movement toward increased flexibility but

is a proliferation of the invisible senority lines which management may not cross except under very limited circumstances.

A radical enlargement of seniority jurisdiction would remove many of those prohibitions and open the way toward increased efficiency and reduction of idle time by means which may not even be thought about seriously today.

2. Reduce employee turnover—With the dirt, noise, heat and/or cold experienced by most bargaining unit employees, along with shiftwork, weekend work and holiday operation, it is no wonder that other less remunerative local jobs are more attractive to some Lukens employees. A seniority system with larger jurisdictions would permit a man to move through a larger series of jobs during his career and would furnish more men with a chance for growth and development. A real continuing opportunity for psychological growth could become an attraction that would increase the retention of good people.

3. Ease of application—This is a desirable goal from both the employers' and employees' viewpoint.

4. De-emphasis of the negative aspects of seniority—as a means for governing the timing of the extension of opportunity to potentially qualified employees cannot be criticized. It is when seniority becomes accepted as the sole criteria for the extension of opportunity or privilege to an employee that all the negative and restrictive aspects of seniority operate to the long range detriment of all. It is generally true that seniority becomes the sole criteria most readily where the overall opportunity is the smallest. Where there is only one job in a seniority unit, seniority quickly becomes the criterion for determining the recipients of privileges; i.e., all daylight schedules or "the bench by the window". Where a seniority unit contains only

two jobs of unequal job class, seniority quickly becomes the sole criterion by which employees ascend to the higher paying job regardless of qualifications. The creation of fewer seniority jurisdictions; each containing substantially broader opportunities, permit the attainment of a better fit of employees to jobs through objective measurement of individual qualifications and performance.

The present seniority system is not the best vehicle for achieving the above points. Since seniority unit size appears to be the most common deficiency of our present system, the Company members of the Civil Rights Sub-Committee will aim toward lowering the number of seniority units and enlarging jurisdiction in their development of the three schemes.

Very truly yours,

/s/ J. E. Muhs
JOHN E. MUHS
Co-Chairman
Civil Rights Sub-Committee

JEM:slt

cc: R. M. Edmonds
J. A. Hall
W. J. Whiteman
T. J. Ryan
N. J. Domangue
G. B. Copeland

PLAINTIFF'S EXHIBIT 87

1/2

Rosie,

Stick this in your first AAP year file with the signed agreement between Johnson & C.L.H. Jr.—a little history is all—came across it in a file.

/s/ Carole

June 15, 1964

Subject: Compliance Review

To: J. L. Irwin, Director of Industrial Relations

From: H. H. Morton, Manager—
Personnel Administration

On June 8 and 9, a compliance review was made by Mr. Walter Wynn of the Department of the Navy related to the non-discrimination presidential order #10925 and #11114.

Mr. Wynn arrived at 9:00 a.m. on June 8 and met with Mr. Domangue, Employment Manager, and myself. He outlined that his two visit was planned to determine our policies and approaches toward this integration problem rather than to review numbers of persons as such, although he did request a copy of our current Form 40, Compliance Report. His visit included a tour through the mill where there were concentrations of personnel in addition to a complete review of our policies and intent in this area.

He requested and was given copies of the following items:

1. Index A Employment Practices—Standard Practice Manual.
2. The current Labor Agreement.
3. Lukens Purchase Order.
4. An hourly Employment Application.
5. A salary Employment Application.
6. A completed form 40A showing employment statistics including the number of Negroes by skill categories as of May 15, 1964.
7. A specific breakdown of the positions of the 37 skilled craftsmen listed on the form 40A report.

His plant tour included:

1. Central Maintenance Locker Rooms.
2. Machine Shop
3. 206" Mill Complex.
4. 140" Locker Rooms.
5. 206" Mill Loading Bank.
6. Flanging Department.
7. Open Hearth area.

At 11:30 a.m. on June 8, Mr. Wynn met with Horace Bent and myself to discuss our purchasing procedures as they relate to government contracts.

At 3:00 p.m. on June 9, Mr. Wynn met with Mr. J. Louis Irwin and myself to summarize the impressions of his compliance review. We were told that he will not submit a formal report to us but that he does make a narrative report for internal distribution. We agreed that a discrimination clause should be inserted in the next Labor Agreement; that we intend to join President Johnson's Plan for Progress Program and would communicate such information to our employees; that we would make sure that terminology is forwarded from Legal Department to Purchasing to be used on purchase orders of large size specified in presidential orders to clear Lukens on government contracts.

In summary, Mr. Wynn's visit was very cordial and his point of view practical. We found Mr. Wynn to be articulate, well-educated, and intent on "selling" a point of view rather than policing.

HHM/be

PLAINTIFF'S EXHIBIT 107

LUKENS STEEL COMPANY
Coatesville, Pennsylvania

August 5, 1966

Mr. Hugh Carcella, Director
District 7
United Steelworkers of America
334 Suburban Station Building
Philadelphia, Pennsylvania 19103

On July 22, 1966, the Company was instructed by Evelyn M. Stahl, Compliance Specialist of the Human Relations Commission of the Department of Labor and Industry to desegregate all locker, shower and toilet facilities in Lukens Steel Company. The Company was also instructed to advise her of its intent to do so within five day and following such declaration of intent, the Company would have 30 days to effectuate complete desegregation. The foregoing was confirmed in writing by Mrs. Stahl and the Company agreed on August 1, 1966 to comply with the aforementioned instructions.

There never has been any doubt about the Company's intention to desegregate its locker, shower and toilet facilities. The Company has had a program since 1962 to improve its locker, shower and toilet facilities through the renovation of existing facilities and, in some instances, the construction of new facilities in accordance with standards established by the Company as being proper and suitable for our employees. During the renovation and/or construction phase, employees would be moved temporarily from existing locker rooms where segregation may have existed, as it did in some instances. Upon the completion of the renovation or construction period, employees were moved in or back to such facilities without regard to race and (if it had not existed

previously) integration was effected with very little, if any, unfavorable expression or reaction from employees affected by the move.

In July 1964, as a further indication of our sincerity in this area of human relations, a "Plan For Progress" was jointly signed by President L. B. Johnson and our President, Mr. Huston. The Company actively and aggressively pursues a policy of equal employment and advancement opportunity for all, which is in accordance with the Company's long-standing policy of nondiscrimination.

Prior to Mrs. Stahl's visit on July 22, the Company has had other visitations, from other representatives of the Human Relations Commission. On these four or five occasions, the representatives were advised of the Company's plans regarding locker, shower and toilet facilities and no objections or protests were registered by such representatives.

The particular area which Mrs. Stahl was concerned about in her instructions was the west side of the plant. The buildings involved are the Green Anneal, Pickling, Finishing, and Cladding buildings, as well as Plants #1, #2 and #3 of the Pressed and Formed Products. The Company has embarked on a crash program to comply with the instructions and the Green Anneal, Pickling, Finishing, and Cladding buildings' facilities will be completely desegregated within the time limits set by Mrs. Stahl, regardless of the expense and movement of employees required. The Company, in this instance, is not complaining about the expense for it believes that integration can be effected in these four buildings without any unfavorable employee reactions.

The Company is also undertaking the necessary steps to desegregate the facilities of the three buildings of Pressed and Formed Products. In this particular area,

desegregation of facilities requires the movement of employees from facilities to which they have become accustomed for many years by practice and preference. The Company and informed local Union representatives expect an expression and reaction of discontent because of the personnel movements required for the integration of employees in this area and the manner in which this discontent may be displayed cannot be predicted at this time. The Pressed and Formed Products employees could understand the shutting down of their individual building's facilities and moving to the new locker room on the west side when it will be completed in May 1967. This move employees could understand, but they consider the moves to be made within the next 30 days as temporary and just a move for the sake of movement. The relationship of employees in the Pressed and Formed Products area has been exceptionally fine over the years and both the Company and Union representatives are apprehensive regarding this coming temporary move, for it may jeopardize a relationship which both parties are proud of and anxious to maintain. If desegregation could be postponed or deferred in the Pressed and Formed Products until the new locker room is completed in May 1967, the relationship that exists among the employees would no doubt continue to be excellent as it has been in the past.

Any assistance you can give us in this matter will be appreciated by the Company, local Union representatives and employees of the Pressed and Formed Products area.

/s/ T. J. Ryan
T. J. RYAN
Manager—Labor Relations

cc: Mr. Lloyd Lawrence

PLAINTIFF'S EXHIBIT 164

AGREEMENT

between

LUKENS STEEL COMPANY

and divisions

BY-PRODUCTS STEEL CO.

and LUKENWELD

and the

UNITED STEELWORKERS
OF AMERICA
A.F.L.-C.I.O.

[EMBLEM]

OCTOBER 20, 1965
COATESVILLE, PENNSYLVANIA

* * * *

ARTICLE XVIII—Non-discrimination

It is the continuing policy of the Company and the Union that the provisions of this Agreement shall be applied to all employees without regard to race, color, religious creed, national origin, or sex. The representatives of the Union and the Company in all steps of the grievance procedure and in all dealings between the parties shall comply with this provision.

* * * *

PLAINTIFF'S EXHIBIT 165

AGREEMENT

between

LUKENS STEEL COMPANY

and the

UNITED STEELWORKERS
OF AMERICA
A.F.L.-C.I.O.

[EMBLEM]

AUGUST 10, 1968

COATESVILLE, PENNSYLVANIA

* * * *

APPENDIX E

TESTING

The October 20, 1965 Agreement provided the following:

"The Company and the Union have not agreed on the subject testing, and, accordingly, have agreed to study the present practices and procedures with respect to the Company's use of written tests as an aid in determining the ability and qualifications of employees for advancement and transfer. Such study shall be completed not any later than June 1, 1966.

"The study shall include:

a. A survey of written tests used by the Company as an aid in the selection of employees for promotion, for transfer, and for entrance into training programs (other than apprenticeship programs);
b. An examination of the relationship of tests to the qualifications required for the work in question; and
c. A survey of administrative procedures used in conjunction with testing programs."

The parties, after giving due consideration to the study results, have arrived at the following understandings to be effective August 1, 1969:

1. While the Union preserves fully its right to challenge through the grievance procedure the present or future use of tests, the Union and the Company agree that where tests are used by the Company as an aid in making determinations of the qualifications of an employee, such a test (except as otherwise provided herein) must in any event be a job-related test. A job-related test, either written or in the form of an actual work demonstration, is one

which measures whether an employee can satisfactorily meet the specific requirements of that job including the ability to absorb any training which may necessarily be provided for that job.

2. In the case of manning new facilities, transfers from one agreed-upon seniority area to another and transfer from one plant to another, the parties have agreed in specific provisions of the seniority section of the Basic Agreement that an employee may be required to have the ability to progress. To the extent that such a requirement is applicable, the parties agree that an employee may be tested as an aid in determining whether he can qualify for the job he is seeking and, in addition, is likely to become qualified to perform the next higher job in the line of progression or promotional sequence. Such testing shall be job-related as described above and specifically directed toward measuring the actual knowledge or ability that is a pre-requisite to becoming satisfactorily qualified on the next higher job in the line of progression or promotional sequence.

This provision is subject to the provisions in Article XI(K), Article XI(L) and Article XI(M) of the Basic Agreement.

3. The criteria for entrance into apprenticeship are not affected by this understanding but are covered in the Appendix dealing with that program.

4. The provisions of this Appendix do not apply to any aspect of testing for entrance into trade and craft jobs and upgrading of trade and craft employees.

5. As to all testing, the following additional guides shall apply:

(a.) Tests shall be fair in their makeup and in their administration;

(b.) Tests shall be free of cultural, racial or ethnic bias; and,

(c.) Testing procedure shall include procedures for notifying an employee of his deficiencies and offering counselling as to how he may overcome them.

APPENDIX F

APPRENTICESHIP TRAINING MEMORANDUM OF UNDERSTANDING

1. Objective of Apprenticeship Training

The objective of apprenticeship training is:

a. To provide a full and fair opportunity for achievement of full craft status to interested and qualified employees of the Company, and
b. To provide the Company with qualified craft personnel.

2. Crafts—Training Periods—Job Classes
The crafts involved, the training periods and the job classes therefor are set forth in the Basic Labor Agreement. The Company may provide methods for advancement to craft status other than through the apprenticeship program.

3. Posting and Filling of Apprenticeship Vacancies
Apprenticeship vacancies shall be filled on the same basis as other permanent vacancies, and shall be subject to the posting practices at the plant. In the filling of apprenticeship vacancies in any given craft the seniority provisions relating to the filling of permanent vacancies within the senority unit shall apply. In the event that the vacancy is not filled from within the seniority unit, the contractual provisions relating to intraplant transfers shall be available to employees desiring an opportunity to participate in the apprenticeship training programs. Representatives of the Company and the Union at each plant shall determine the method or procedures whereby apprenticeship vacancies not filled from within the seniority unit will be made generally known to employees, which may include posting of vacancies at appropriate locations or any other method designed to acquaint employees not directly

associated with the craft in which the vacancy occurs with the fact that such vacancy exists.

In the determination of relative ability and physical fitness in accordance with the applicable seniority provisions of the Basic Labor Agreement, the Company shall be limited to the use of such examinations and testing procedures as are related to the physical and training requirements of the craft involved.

4. Retention of Apprentices during Periods of Reduced Operations

An apprentice who has completed at least 25% of the total hours required to complete the apprenticeship program in which he is enrolled at the time he would, by reason of the applicable seniority provisions, be laid off or demoted to a lower rated job, shall be required to make a binding election either to:

(a.) be laid off, demoted and recalled in accordance with all applicable seniority provisions; or (b.) be placed in layoff-training status and thereafter be entitled to benefits from the SUB Plan without regard to any other SUB eligibility requirements. The amount of such benefits shall be the same as if he had been laid off. An apprentice who has elected this option (b) shall attend such classroom training periods as are consistent with his status in the apprenticeship program in which he is enrolled. He shall also perform such on-the-job assignments as are consistent with the apprenticeship program in which he is enrolled provided, however, that such assignments shall not deprive any other employee of employment to which such other employee would otherwise be entitled. Such layoff-training status shall cease at such time as

the apprentice is entitled to be recalled to his normal apprenticeship position in accordance with the applicable seniority provisions.

5. Craft Status

Each apprentice, upon satisfactory completion of the apprenticeship program in which he is enrolled, shall thereafter be assigned to craft status and rate in accordance with Section VI-A-2 of the January 1, 1963 Job Description Classification Manual, as amended August 1, 1968.

* * * *

PLAINTIFF'S EXHIBIT 166

AGREEMENT

between

LUKENS STEEL COMPANY

and the

UNITED STEELWORKERS

OF AMERICA

AFL-CIO

[EMBLEM]

AUGUST 1, 1971

COATESVILLE, PENNSYLVANIA

* * * *

ARTICLE II—Management

The management of the plants and the direction of the working forces, including the right to hire or suspend for just cause, discharge for just cause or demote for just cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company.

* * * *

ARTICLE XI—Continuous Service and Seniority

A. 1. The length of an employee's Company continuous service shall date from his original or subsequent hiring date.

2. Accumulated service days in a subdivision within the limits of Company continuous service, shall determine seniority standing in a subdivision.

3. There shall be no deduction of accumulated service days for any time lost, except for periods of layoff of more than seven (7) consecutive days and breaks in continuous service and seniority as provided in this Article when the employee is recalled within such seven (7) day period to the seniority subdivision from which he was laid off.

B. The parties recognize that promotional opportunity and job security in event of promotions, decrease of forces and rehiring after layoffs should increase in proportion to length of continuous service, and that in the administration of this Article the intent will be that wherever practicable full consideration shall be given continuous service and seniority in such cases.

In recognition, however, of the responsibility of Management for the efficient operation of the works, it is understood and agreed that in all cases of:

1. Promotion (except promotions to position excluded under the definition of "employees" in Article I—Recognition) the following factors as listed below shall be considered; however, only where factors "b" and "c" are relatively equal shall seniority be the determining factor:

a. Seniority,

b. Ability to perform the work,

c. Physical fitness.

2. Decrease in forces or rehiring after layoffs, the following factors as listed below shall be considered; however, only where both factors "b" and "c" are relatively equal shall continuous service and seniority be the determining factors:

a. Seniority,

b. Ability to perform the work,

c. Physical fitness.

3. The Company shall be the judge of ability. In case the Union disagrees with the Company's judgment the Union may within ten days after notification institute a grievance and the Company must show that it had a reasonable basis for its decision. Until final determination of the case is made, the position will be considered temporary.

4. When a vacancy which is a promotional opportunity develops, or is expected to develop (other than a temporary vacancy) in any seniority unit, the Company shall post, or make known by other suitable means, the existence of such vacancy or expected vacancy in such seniority unit.

During the appropriate period of time, employees in the seniority unit who wish to apply for the vacancy or expected vacancy may do so in writing in

accordance with the rules developed by the Company for each seniority unit.

If the vacancy or expected vacancy is not filled from within the seniority unit, it will be posted on a plantwide basis in a manner to be determined by the Company.

The Company shall, if in its judgment there are applicants qualified for the vacancy or expected vacancy, fill same from among such applicants in accordance with the provisions of Paragraphs B and B.1 above.

* * * *

I. New employees and those hired after a break in continuity of service will be regarded as probationary employees for the first 260 hours of actual work and will receive no continuous service credit during such period. During such period, probationary employees may be laid off or discharged as exclusively determined by the Company. This provision will not be used for purpose of discrimination because of membership in the Union. Probationary employees continued in the service of the Company subsequent to 260 hours of actual work from the date of original hiring shall receive full continuous service credit from the date of original hiring.

* * * *

ARTICLE XVIII—Non-discrimination

It is the continuing policy of the Company and the Union that the provisions of this Agreement shall be applied to all employees without regard to race, color, religious creed, national origin, or sex. The representatives of the Union and the Company in all steps of the grievance procedure and in all dealings between the parties shall comply with this provision.

* * * *

APPENDIX H

TESTING

The October 20, 1965 Agreement provided that the parties shall conduct a study on the subject of Testing. The results of that study led to a special agreement dealing with Testing, identified in the August 10, 1968 Agreement as Appendix E. Based on the experience of the parties with that Appendix, the parties have agreed to certain revisions and hereby provide for the following:

1. While the Union preserves fully its right to challenge through the grievance procedure the present or future use of tests, the Union and the Company agree that where tests are used by the Company as an aid in making determination of the qualifications of an employee, such a test must in any event be a job-related test. A job-related test, **whether oral,** written or in the form of an actual work demonstration, is one which measures whether an employee can satisfactorily meet the specific requirements of that job including the ability to absorb any training which may necessarily be provided **in connection with** that job. **A written test may not be used unless the job requires reading comprehension, writing or arithmetical skills, and may be used to measure the comprehension and skills required for such job.**

2. In the case of manning new facilities, transfers from one agreed-upon seniority area to another and transfers from one plant to another, the parties have agreed in specific provisions of the seniority section of the Basic Agreement that an employee may be required to have the ability to progress. To the extent that such a requirement is applicable, the parties agree that an employee may be tested as an aid in determining whether he can qualify for the job he is seeking, and, in addition, is likely to become quali-

fied to perform the next higher job in the line of progression or promotional sequence. Such testing shall be job-related as described above and specifically directed toward measuring the actual knowledge or ability that is a prerequisite to becoming satisfactorily qualified on the next higher job in the line of progression or promotional sequence, **taking into consideration the normal experience acquired by employees in such promotional sequence. This provision is subject to the provisions in Paragraphs K and L of Article XI of the agreement.**

3. All tests shall be:

(a) Fair in their makeup and in the administration; b. Free of Cultural, racial or ethnic bias.

4. Testing procedure shall in all cases include notification to an employee of his deficiencies and an offer to counsel him as to how he may overcome such deficiencies.

5. The provisions which shall apply in determining qualifications for entrance into Apprenticeship or other training programs are set forth in Appendix I of the August 1, 1971 Agreement.

APPENDIX I

APPRENTICESHIP TRAINING MEMORANDUM OF UNDERSTANDING

1. Objective of Apprenticeship Training

The objective of apprenticeship training is:

(a) To provide a full and fair opportunity for achievement of full craft status to interested and qualified employees of the Company, and

(b) To provide the Company with qualified craft personnel.

2. Crafts—Training Periods—Job Classes

The crafts involved, the training periods and the job classes therefor are set forth in the Basic Labor Agreement. The Company may provide methods for advancement to craft status other than through the apprenticeship program.

3. Posting and Filling Apprenticeship Vacancies

Apprenticeship vacancies shall be filled on the same basis as other permanent vacancies and shall be subject to the posting practices at the plant. In the filling of apprenticeship vacancies in any given craft the seniority provisions relating to the filling of permanent vacancies within the seniority **units** shall apply. **Seniority units may be an entire plant or any subdivision thereof, as determined by the local parties.** The contractual provisions relating to intra-plant transfers shall be available to employees desiring an opportunity to participate in the apprenticeship training programs, **and employees interested in apprenticeship training opportunities are encouraged to utilize these procedures.** Representatives of the Company and the Union at each plant shall determine the method or procedures whereby appren-

ticeship vacancies will be made generally known to employees, which may include posting of vacancies at appropriate locations or any other method designed to acquaint employees not directly associated with the craft in which the vacancy occurs with the fact that such vacancy exists.

In the determination of relative ability and physical fitness as **used to fill apprenticeship vacancies** in accordance with the applicable seniority provisions of the Basic Labor Agreement, the Company shall be limited to use of such examinations and testing procedures which are:

(a) job related,

(b) fair in their makeup and in their administration,

(c) free of cultural, racial or ethnic bias

The parties agree that the purpose of an apprenticeship training program is to train and qualify individuals to perform the assignments of a given craft and that an applicant for apprenticeship must have the ability to absorb the appropriate training.

The present practices of the Company with respect to the allowance of advanced credit in any apprenticeship program based on related training and experience achieved prior to entry into such program shall be continued.

4. Retention of Apprentices During Periods of Reduced Operations

Except where circumstances outlined in Paragraphs 4(f), (g) and (h) are currently applicable, an apprentice who has completed at least 25% of the total hours required to complete the apprenticeship program in which he is enrolled at the time he would, by reason of the applicable seniority provi-

sions, be laid off or demoted to a lower rated job, shall be **afforded the opportunity to and be** required to make a binding election either to: be laid off, demoted and recalled in accordance with all applicable seniority provisions; or **be placed in special training status and thereafter identified as Apprentice-Special Training and, in lieu of the rate of pay as would otherwise be determined under the Rate of Pay Section of the Agreement applicable to him, be paid at an hourly rate equal to 1/40 of the 110% of the sum of the state unemployment compensation and weekly benefits under the SUB Plan he would have received had he elected to be laid off without regard to any other SUB eligibility requirements, provided that for any week he is engaged in classroom and/or on-the-job type assignments for some but less than 40 hours, he shall be paid such hourly rate for a minimum of 40 hours less any hours he did not participate in such assignments for reasons other than the failure of the Company to make such assignments available or for just cause. The provisions of the Agreement relating to Sunday premium and shift differential shall not be applicable.**

An Apprentice-Special Training will be entitled to the provisions of the Basic Labor Agreement, and will be normally scheduled for 5 consecutive 8 hour days of training (classroom and/or on-the-job type assignments) per week. He will be expected to complete such daily and weekly hours of training which are maximums and will not be exceeded. Further, in weeks containing a holiday an apprentice will not be scheduled for training on the holiday.

Such classroom and on-the-job assignments as he may be called upon to perform shall be consistent with the apprentice program in which he is enrolled provided, however, that such assignments shall not

deprive any other employee of employment to which such other employee would otherwise be entitled.

An apprentice who elects to be placed in such lay-off training status will only be removed from such status for any of the following:

(a) upon recall to active employment as an apprentice in accordance with the applicable seniority provisions,

(b) upon satisfactory completion of his apprenticeship program,

(c) upon suspension of the apprenticeship retention program due to a drop in the financial position of the SUB Plan below 35%,

(d) upon unsatisfactory performance, including failure to report without just cause for scheduled hours of training,

(e) upon changing his election with the mutual consent of management,

(f) upon the abandonment of the craft within any plant as the result of a shutdown of the plant, a portion thereof, or discontinuance of a product line,

(g) upon the substantial reduction in the number of required craftsmen within any given craft as a result of technological changes in steel making processes, practices or equipment,

(h) upon the mutual agreement between a representative of the corporate office of the company and the international union that such special training status within a given craft or crafts should be discontinued or suspended.

An apprentice who is removed from special training status in accordance with b, c, d, e, f or g as

stipulated above will be placed on layoff and recalled in accordance with all applicable seniority provisions.

5. Craft Status

Each apprentice, upon satisfactory completion of the apprenticeship program in which he is enrolled, shall thereafter be assigned to craft status and rate in accordance with Section VI-A-2 of the August 1, 1971 Job Description Classification Manual.

* * * *

PLAINTIFF'S EXHIBIT 167

AGREEMENT

between

LUKENS STEEL COMPANY

and the

UNITED STEELWORKERS
OF AMERICA
A.F.L.-C.I.O.

[EMBLEM]

AUGUST 1, 1974

COATESVILLE, PENNSYLVANIA

* * * *

[Article XI]

I. New employees and those hired after a break in continuity of service will be regarded as probationary employees for the first 520 hours of actual work and will receive no continuous service credit during such period. During such period, probationary employees may be laid off or discharged as exclusively determined by the Company. This provision will not be used for purpose of discrimination **because of race, color, religious creed, national origin or sex or** because of membership in the Union. Probationary employees continued in the service of the Company subsequent to 520 hours of actual work from the date of original hiring shall receive full continuous service credit from the date of original hiring.

* * * *

PLAINTIFF'S EXHIBIT 168

AGREEMENT

between

LUKENS STEEL COMPANY

and the

UNITED STEELWORKERS
OF AMERICA
A.F.L.-C.I.O.

[EMBLEM]

AUGUST 1, 1977

COATESVILLE, PENNSYLVANIA

* * * *

[Article XI]

I. New employees and those hired after a break in continuity of service will be regarded as probationary employees for the first 520 hours of actual work and will receive no continuous service credit during such period. During such period, probationary employees may be laid off or discharged as exclusively determined by the Company. This provision will not be used for purpose of discrimination because of race, color, religious creed, national origin or sex or because of membership in the Union. Probationary employees continued in the service of the Company subsequent to 520 hours of actual work from the date of original hiring shall receive full continuous service credit from the date of original hiring.

* * * *

PLAINTIFF'S EXHIBIT 206

Eighth Meeting
COMPANY & UNION NEGOTIATIONS
April 24, 1965—10:00 a.m.-7:00 p.m.
Industrial Relations Conference Room

Attendance:

Representing Company	*Representing Union*
T. J. Ryan	B. O. Staub
J. E. Muhs	Lloyd Lawrence
D .O. Gloven	Clair Thompson
E. J. Charlton	Nicholas DePedro
H. B. Bent	Harry Cavuto
H. H. Morton	James Brown
C. L. Huston III	William Saalbach
W. G. Pfaff	Anthony Fioriglio
	Albert Cooper

Also Present:

R. P. Holleran (During discussion on Incentives)
Isaac Whitaker
Malcolm Detterline

Opening Comments

Mr. Ryan mentioned that Mr. Staub and he had decided to make an all-out effort to reach a settlement this week-end and more specifically today.

He stated that Mr. Staub was under a time pressure factor in that he had to meet with Alan Wood and Pottstown (Bethlehem) this next week in addition to a meeting in Pittsburgh on Monday, April 26, 1965.

Mr. Ryan read a few sample letters from Lukens' customers (received from Mr. Mullestein) which indicated

that the customers are prepared to take all necessary steps to remove all assemblies (between Monday and Friday) from Welded Products which would be tied up during a work stoppage. He pointed out that this is a short vacation year and the importance of vacation cash options relative to the time element.

Mr. Ryan stated that he was prepared to submit language on which the Union and Company had previously indicated their agreement in principle.

Note: The following language appears in the order of distribution to the Union for review and discussion.

* * * *

Article XXII—Non-Discrimination Clause

Company Position

Mr. Ryan suggested an addition to the language to read as follows:

> "It is the continuing policy of the Company and the Union that the provisions of this Agreement shall be applied to all employees without regard to race, color, religious creed or national origin."

Union Position

Mr. Staub agreed and stated that this should have been proposed by the Union.

Closing Comments

Mr. Staub stated that the Company and Union have reached an agreement on local issues, but insisted that regardless of what was agreed to locally, the Union wants full acceptance of the basic agreement from Pittsburgh except to that which he agreed not to enforce.

Mr. Ryan agreed and suggested that there be no publicity from either Company or Union.

Upon agreement, Mr. Staub and Mr. Ryan exchanged copies of initialed language for proper signatures of same.

The meeting was adjourned.

Attached is a summary sheet of the final position taken by the Company and Union on their respective proposals.

/s/ Charles L .Huston
C. L. HUSTON, III
Personnel Assistant

PLAINTIFFS' EXHIBIT 400

Employment Record of Jones, Monroe W. Social Security No. 164-26-9638

DEPARTMENT	CHECK	POSITION	FOREMAN	FROM	TO	DISPOSITION
A.P.T. Plant	5400	Hookman	R. L. Bunting	4-4-52	1-30-55	Pos. Change
* * * *						
APT Plant	H5400	Checker	W. Metcalf	4-10-68	6-1-69	Transferred
Sheet, Tin, Paint	H5400	Painter Helper	R. J. Simes	6-2-69	8-24-69	Promotion
Sheet, Tin, Paint	H5400	Painter "C"	R. J. Simes	8-25-69	9-7-70	Promotion
Sheet, Tin, Paint	H5400	Painter "B"	R. J. Simes	9-8-70	10-30-70	Laid Off #1
APT Plant	H5400	Furnace Helper	W. Metcalf	11-1-70	4-10-71	Recalled
Sheet, Tin, Paint	H5400	Painter "B"	R. J. Simes	4-11-71	11-4-71	Laid Off #2
APT	H5400	Furnace Helper	W. Swift	11-7-71	4-22-72	Recalled
Paint Shop	H5400	Painter "B"	R. J. Simes	4-23-72	3-19-73	Promoted
Sheet-Tin-Paint	H5400	Painter "A"	R. J. Simes	3-20-73		

#2—Red. in force eff. 11-6-71 exercised job claim in A.P.T. 11-7-71

#1—Red. of forces eff. 10-31-70 exercised Job Claim A.P.T.

PLAINTIFF'S EXHIBIT 449

Docket No. E-1311

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Case Assignment Record

Region 3, County Chester

Rec'd 6/20/62 (Date) Assigned [Illegible] (Date) From [Illegible]

Complainant Joshua Grave, Jr.

Address 827 Lafayette St., Coatesville, Pa.

Phone DU-4-6982

Respondent Lukens Steel Co.

Address Coatesville, Pa.

Phone DU-4-6200

General Charge Race. Fx IF

Specific Charge: Complainant alleges company maintains separate locker room facilities for Negroes.

• • • •

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CASE CLOSING RECOMMENDATION

Docket No. E-1311

Date Docketed: 6/29/62

Complainant	*Respondent*
Joshua Grove, Jr. Coatesville, Pennsylvania	Lukens Steel Company Coatesville, Pennsylvania

Charge: The Complainant, a Negro, alleges that it is the policy of Respondent Co. to make locker room assignments on a segregated basis; Complainant further alleged that because of Respondent Co. policy, he is assigned to a segregated locker room.

Summary of Facts:

FR conferred with the following Respondent representatives: Mr. J. Louis Irwin, Director of Industrial Relations, Mr. Harry Morton, Director of Personnel, Mr. Herman Whiteman, Supervisor of Personnel Services, and Mr. Richard Sweigart, Foreman Personnel Services. A tour of the Respondent Company locker rooms was made.

Statements and/or observations revealed that:

1. Respondent Co. does not have a policy of making locker room assignments on the basis of race, color, religion or national origin.
2. Where feasible workers are assigned locker rooms in their area of work.
3. Some of the locker rooms have all Negro occupants, some have all white occupants and others have a mixed occupancy.

4. Many years ago it was traditional and the accepted thing to assign Negroes and whites to separate locker rooms. This practice was discontinued several years ago.
5. There will be more integrated locker rooms in the immediate future due to renovation of locker rooms, the building of new locker rooms and the reassignment of workers.
6. Complainant has been moved to a mixed locker room since making complaint.
7. In the past some Negroes have resisted the Respondent's efforts to move them into locker rooms with whites.

Staff Findings:

Staff found no facts to credit the allegations of the complaint.

Recommendations:

It is recommended the Commission close the case on the ground that the charge was not established.

R. Earl Smith
Field Representative

Elizabeth Henderson
Director, Bureau of Compliance

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CASE CLOSING RECOMMENDATION

May 23, 1963

Docket No. E-1311

Date Docketed: 6/20/62

Initial Contact with Complainant: 7/13/62

Complainant	*Respondent*
Joshua Grove, Jr. Coatesville, Pennsylvania	Lukens Steel Company Coatesville, Pennsylvania

Charge: Race

The Complainant, a Negro, alleges that it is the policy of Respondent Co. to make locker room assignments on a segregated basis; Complainant further alleges that because of Respondent Co. policy, he is assigned to a segregated locker room.

Summary of Facts:

FR conferred with the following Respondent representatives: Mr. J. Louis Irwin, Director of Industrial Relations, Mr. Harry Morton, Director of Personnel, Mr. Herman Whiteman, Supervisor of Personnel Services, and Mr. Richard Sweigart, Foreman Personnel Services. A tour of the Respondent Company locker rooms was made.

Statements and/or observations revealed that:

1. Respondent Co. does not have a policy of making locker room assignments on the basis of race, color, religion or national origin.
2. Where feasible workers are assigned locker rooms in their area of work.

3. Some of the locker rooms have all Negro occupants, some have all white occupants and others have a mixed occupancy.
4. Many years ago it was traditional and the accepted thing to assign Negroes and whites to separate locker rooms. This practice was discontinued several years ago.
5. There will be integrated locker rooms in the immediate future due to renovation of present locker rooms, the building of new locker rooms and reassignment of workers.
6. Complainant has been moved to a mixed locker room since making the complaint.
7. In the past some Negroes have resisted the Respondent's efforts to move them into locker rooms with whites.

FR has subsequently verified that assignment of personnel to the two newly completed locker rooms is on an integrated basis.

Staff Findings:

Staff found probable cause to credit the allegations of the complaint in that at the time of initial contact with the respondent company, there were locker rooms occupied by all Negro and other occupied by all whites. However an adjustment is in effect.

Recommendations:

It is recommended the Commission close the case as adjusted. Subject to review within 6 months.

R. Earl Smith
Field Representative

Elizabeth G. Henderson
Director of Compliance

17120

July 26, 1963

Mr. J. Louis Irwin
Director of Industrial Relations
Lukens Steel Company
Coatesville, Pennsylvania

RE: *Docket No. E-1311, Joshua Grove, Jr. vs. Lukens Steel Company*

Dear Mr. Irwin:

The Pennsylvania Human Relations Commission has reviewed the results of the investigation in the above case in which the complainant alleged that it was the policy of respondent company to assign locker room facilities on a segregated basis, in violation of the Pennsylvania Human Relations Act. The facts secured through the investigation of this case clearly established probable cause to credit the allegations of the complainant.

Since you have met the required terms of adjustment and have submitted to this Commission written confirmation that it shall be your policy to comply with the Pennsylvania Human Relations Act in the assignment of personnel to locker room facilities irrespective of their race, color, religious creed or national origin, the Commssion has closed this case in its file as adjusted, subject to review within a 6 month period.

Thank you for your cooperation with the Commission representative during the investigation of this matter.

Sincerely yours,

ELLIOTT M. SHIRK
Executive Director

CJ:rcw
cc: FR Smith

PLAINTIFF'S EXHIBIT 653

LUKENS STEEL COMPANY AND SUBSIDARIES
UNITED STEELWORKERS OF AMERICA
C. I. O., Local 1165

Number L-3969

Date 9-6-68

Rec'd By E. Davis

Name LOCAL UNION #1165

Check No.

Job Dept. Mechanical Div. Riggers

Employee's Statement of Grievance

We, the Local Union, contend the seniority posting in the Riggers is incorrect.

We ask the Company to correct the seniority posting in the Riggers.

Signed [ILLEGIBLE]
Date Aug. 29, 1968

First Step, Foreman's Answer:

The issue stated above involves Samuel Brown #1718 only. Mr. Brown claims that the transfer date and transferring procedure is incorrect. At his foreman's request Mr. Brown went to the Employment Dept. to review his employment records.

This grievance denied, on the basis that the seniority posting is correct.

Settled ———— Appealed to Next Step ✓

/s/ [Illegible]

/s/ [Illegible]
(Foreman)
Date 9-13-68

Date rec'd by Sup't of Dept [Illegible]

Second Step:

A further review of the seniority records & circumstances surrounding this case was made 9-17-68, & in view of an error in procedure, the company agrees to change the posting of the Rigger Subdivision. Change to Credit § BROWN #171 with proper seniority.

Settled yes Appealed to Next Step ————

Signed /s/ [Illegible]
(Union)

Signed /s/ R. J. [Illegible]
(Sup't)

Date 10-10-68

* * * *

PLAINTIFF'S EXHIBIT 710

UNITED STEELWORKERS OF AMERICA
C. I. O., Local 1165

Number L-7660-7

Date 3-4-75

Rec'd By T. Scull

Name Daniel London Check No. 6986

Address ————————

Job ———— Dept. Machine Forge Div. Loco Shop

Employee's Statement of Grievance

I, the undersigned, contend the Company gave me an unjust 4-day suspension on March 4, 1975.

I ask the Company to strike this mark from my record, and to pay me all monetary losses.

/s/ Daniel L. London

Date March 3, 1975

---

* * * *

Third Step:

3rd Step—L.U. #1165 April 15, 1975

Grievance L-7660-7—Daniel London #6986, Loco Shop, Machine & Forge—Rec. 3-4-75

'I, the undersigned, contend the Company gave me an unjust 4-day suspension on March 4, 1975.

'I ask the Company to strike this mark from my record, and to pay me all monetary losses.'

UNION POSITION: The Union stated that there is no question that the grievant was guilty of fighting based on the statement he made to Plant Protection. However, the Union requested that the grievance be remanded to 2nd Step to insure that the question involving availability of tools has been resolved.

COMPANY POSITION: The Company stated that fighting will not be tolerated. The Company further stated that everyone in the shop is now aware of how tools are to be distributed and used.

3rd Step March 1, 1977

Grievance L-7660-7—Daniel London #6986, Loco Shop—Rec. 3-4-75.

> "I, the undersigned, contend the Company gave me an unjust 4-day suspension on March 4, 1975.
>
> I ask the Company to strike this mark from my record, and to pay me all monetary losses."

UNION POSITION: None

COMPANY POSITION: None

DISPOSITION: Withdrawn by the Union without precedent or prejudice.

UNITED STEELWORKERS OF AMERICA

LOCAL UNION 1165

AFL CIO CLC

April 21, 1977

P. T. Scull, Assistant
Manager-Labor Relatons
Lukens Steel Company
Coatesvlle, Pa. 19320

Dear Mr. Scull:

Listed below are grievaces and their dispositions for your records.

Considered Closed

L-7660-7

* * * *

Very truly yours,

/s/ James O. Brown
JAMES O. BROWN, Chairman
Grievance Committee

PLAINTIFF'S EXHIBIT 711

LUKENS STEEL COMPANY

NOTICE OF DISCIPLINARY ACTION

To: Daniel L. London #6986 Date: March 3, 1975

This is to give you formal notice that the following disciplinary action has been taken and a record of such placed in your personnel file in the Employment Department of Lukens Steel Company.

☒ Suspension: Dating From 3/4/75 to 3/7/75 inclusive

Reason: Striking a fellow workman.

☐ Discharge: Effective Date

Reason: _____

I acknowledge notification of the above action, as required under the terms of the Labor Agreement dated August 10, 1968.

Signed _____ Date 3/3/75
Employee signature

White: Employment Department copy

Yellow: Employee copy

Pink: Supervisor copy

LUKENS STEEL COMPANY

WARNING OR SUSPENSION NOTICE

Date 3-3-75

Clock No. 6986

Employee's name in full: Daniel L. London

Department: M. & F. Loco Shop

Cross out one:

Suspension

Infraction—Cause for Warning or Suspension: Striking a fellow workman.

Suspension date from: 3-4-75 to 3-8-75.

Length of penalty: 4 days.

Shift involved: circle one 1 2 3
[Number 2 circled]

Has this infraction been discussed with employees: Yes.

When: 3-3-75

By whom: Newhauser-Beck Kosnet.

Give Full Details of Infraction:

Having requested keys London was refused by Taylor.

London hit Taylor and claims Taylor called him a Black Bastard.

See attached evidence sheets for details.

* * * *

Endorsement

Foreman: /s/ Lou Kosnet

Superintendent: /s/ O. Newhauser

* * * *

March 3, 1975

Statement of Paul Taylor, #3113, Loco Shop. taken in the presence of Larry Hamm, Committeeman, Zone 8, and Captain Jerry DeLiberato by James F. Updyke.

Paul, will you tell us what happened this morning at about 8:15 A.M.

I was working at the Rail Yard, getting my tools out when Danny London came off the truck and began to argue with me about some tools I had. He tried to tell me the tools belonged to Lukens, and I told him to go to the Foreman and get an order to go to the Storeroom if he needed tools. Right after that he told me if I didn't loan him the tools, I would pay for it. Right after that he hit me once and I stepped back. I thought he was going to leave then, and I turned around and he hit me a second time. Then I told him I was going to call someone, and he left the area.

Q. Did you strike back at him at all?

A. No way, no way.

After he left, I called Lionel Beck, and he and Jack Monaghan came up and told me to go to First Aid.
I was treated at First Aid.
During the conversation with Taylor, the Shop Steward, Al Carey #3856 appeared at Plant Protection Hdq. and heard Taylor's statement.

Q. (By Al Carey) Was there any name calling going on.

A. There was no name calling, ——. People went to use these tools.

Q. (By Al Carey) Are these your personal tools or did you get them from the Storeroom?

A. I got them from the Storeroom.

Q. Indirectly, they are Lukens tools?

A. Yes.

Q. (By Al Carey) Did Dan mention that Lou Kornet sent him up here?

A. No, he did not.

Q. (By Al Carey) Had Danny ever used your tools before?

A. Not to my knowledge.

Q. (By Al Carey) How is the rapport between you and Danny, have you ever had any words?

A. [Illegible] ever seen him, except to say good morning.

/s/ Paul [Illegible]

Witnessed: JERRY DELIBERATO

AL CAREY

LIONEL R. BECK

March 3, 1975

Statement of Leon Bembenek, # 8722, Loco Shop, taken in the presence of Al Carey, Shop Steward, Lionel Beck and Capt. Jerry DeLiberato by James F. Updyke.

"Danny came over to me and asked me if I was going on the truck, this was in the Loco Shop, at starting time. I told him I was not going on the truck, I was going to the Rail Shears. Danny asked me for the tools, and I told him that I couldn't give him them as they belonged to Paul Taylor. Then I went to the Rail Yard to work. Danny came to the Rail Yard and asked Paul for the tools. Paul told him that he was ——, not going to give him the tools as they were his personal tools. Danny then said, they are not your personal tools, they are Lukens tools. Then they got to arguing over the tools, and Danny swiped at him and knocked him down, then Sam Law came over and took Danny on to the truck. Then Paul said he was going to see somebody about this and Lionel came over.

Q. (By Al Carey) Did you hear any names called?

A. Not that I can recall.

Q. (By Al Carey) You couldn't hear any other conversation about what they were arguing about?

A. No.

Q. (By Al Carey) Where are the tools located?

A The tools are kept in a bucket in an old electricians cabinet. Paul's personal lock is on this cabinet, at the Bridge Track.

Q. (By Al Carey) Have you and Danny worked on the truck before?

A. Yes.

Q. What tools did you use?

A. I got them from Paul Taylor.

Q. (By Al Carey) Did you get the tools from the cabinet when you and Danny worked together?

A. Yes.

Q. (By Al Carey) How did you get entrance into the cabinet?

A. Paul gave me a key nine or ten months ago.

Q. (By Al Carey) Was Paul aware that you and Danny were working out of the same locker?

A. I'd say yeah.

/s/: [Illegible]

Witnessed: AL CAREY

LIONEL R. BECK

JERRY DELIBERATO

March 3, 1975

Statement of Daniel L. London, #6986, Loco Shop, taken in the presence of Al Carey, Shop Steward, Lionel Beck and Captain Jerry DeLiberato by James F. Updyke.

Danny, will you tell us about the incident which occurred this morning at about 8:15 A.M.

"I got to work this morning at the Loco Shop and I learned that Leon was going to work at the Rail Shears and I asked Lou Kornet where he wanted me to work. He told me that I could ride the truck today. I asked Lou if he had an extra key for the cabinet for the tools at the Bridge Track. He said he did not have a spare key, to go over to see Ben (Leon) and get the key from him. I got the gauges for the acetylene and oxygen and then rode on down to the rail shears. I asked Ben if he had the key for the locker down there so I could get the tools, Ben told me they were not his tools, they were Taylor's tools. I asked Taylor if he could use his tools and he hesitated for a while, he told me they were his tools and I was to get my own tools. I didn't say anything, I got on the truck and started to look around for some jobs I could do on the RR cars. I found a few cars that needed some work done on them but I needed tools to do the job. When I found some other small jobs I could do if I had the tools, it started to bother me and I couldn't understand why I couldn't use those tools when others used them. After I came into the office for my break, Lou told me that plans were changed and I was supposed to go to the Electric Melt Shop. I told him I might as well go down there as I had no tools to do the work up here. I asked him whose tools they were that were up in the cabinet at the Bridge Track. He asked me why, whats the matter, won't they let them use them? I told him, No, Taylor told me they were his tools and he wouldn't let me use them. Before Sam took me down to the EMS, I asked him to take me over to the Rail

Shears as there was something I wanted to clear up. So we got down to the Rail Shears, I walked around a pile of ties which were between the track and where Taylor was. I saw Taylor and told him that I found out that the tools weren't his, that actually they were the Company's, and I couldn't understand why he didn't want me to use them. He said, they are my tools and I wasn't goint to let you use them. I mentioned the fact that he let Ben use them, and why couldn't I use them. He told me he could let anyone he wanted to use his tools. I told him I couldn't understand why he would let others use his tools but would not let me use them, they were company tools. He said, You people think you can do whatever you want to and get your own way. Having this term "you People" thrown at me, I wanted to know what he meant, I wanted him to be more specific. He said "you know what I mean", I said, "No I don't, explain yourself." I asked him this two or three times about his expression, "you people" and he gave me the same answer. He wanted me to get out of there and he said something like, "Get out of here you black bastard". I asked him . . . what did you say . . . he answered, . . . you heard me. I said, yes, I did, and that's when I hit him. I knocked him down and when he got up, he said he was going to report me.

Signed: DANIEL L. LONDON

Witnessed: AL CAREY

Questions by Al Carey:

Q. After this break, did Lou tell you they were company tools?

A. Lou told me they were company tools.

Q. Was Ben there when you struck Taylor, did he see it?

Q. Did he hear any of the conversation?

A. He was within hearing distance but I don't know if he was paying attention as he was working.

Q. Did you ever threaten Taylor in the pursuance of this conversation?

A. I just told him that I didn't want him to fuck with me, I wouldn't have anything to do with him, and he wasn't to have anything to do with me.

Q. How many times did you strike Taylor?

A. Once.

Q. When you worked on the Bridge Track before did you use Taylor's tools?

A. He must have known, as I was working with Ben.

Q. Did you know if they were Taylor's tools or the Company's tools?

A. I had a feeling they were Company tools but I wasn't sure until I asked Lou.

Q. When you went back to the Rail Shears did you inform Taylor that Lou said they were Company tools, and what was his reply?

A. I mentioned to him that I found out they were Company tools. He said "I don't care what I found out," they were his tools.

Signed: DAVID L. LONDON

Witnessed: AL CAREY

March 3, 1975

Statement of Sam Law, #6933, Loco Shop, taken in the presence of Al Carey, Lionel Beck and Captain DeLiberato by James F. Updyke.

Sam, will you tell us anything you know about the incident which occurred this morning at about 8:15:

The only thing I know, I was setting in the truck, I heard some conversation, and I got out of the truck and stood there for a while and when I heard the arguing, I told him, Danny London, to come on, get in the truck and he came along with me. I then took him down to the Electric Furnace.

Q. (By Al Carey) When you took him down to the Electric Furnace, did Danny say anything about tools.

A. I asked him what they had been arguing about and he told me they were arguing about tools.

Q. What kind of rapport did Danny have with Taylor?

A. I don't know.

Signed: SAMUEL L. LAW

Witnessed: AL CAREY

LIONEL R. BECK

JERRY DELIBERATO

March 3, 1975

Statement of Lou Kornet, #3109, Foreman, Loco Shop, taken in the presence of Al Carey, Lionel Beck and Capt. Jerry DeLiberato, by James F. Updyke.

Lou, what knowledge to you have of the incident which happened this morning?

"Dan came into the office and asked me where I wanted him to go. I told him that as long as his partner was working at the Rail Shears, he was to go out on the service truck and go to the Bridge Track for minor repairs. He came back and told me that he would need tools and I told him to go to the rail shears and get the keys from Ben or Taylor, whoever had them.

He went up and came back and asked me whether the tools in that tool box were personal tools or company tools. I told him they were company tools. He told me that Taylor wouldn't give him the keys, and I told him to forget about that I was going to send him down to the EMS to work on pouring cars.

With that I told Sam Law to take him down to the EMS in the service truck.

Dan called me from the EMS and told me that he had to go to First Aid for therapy. I sent the truck down for him and had him brought up to First Aid.

After that Lionel and Jack came over to me and asked me where Danny was, and I told them he was at First Aid. Lionel told me that when Danny was finished he was to come to Lionel's office. I called First Aid and told Danny to come back to the Loco Shop. When Lionel and Jack came over, they told me there had been a scuffle, and this was the first I knew about it.

Q. (By Al Carey) What kind of rapport was there with Danny and Taylor? Was there ever any confrontation?

A. To my knowledge I knew of no confrontation between Danny and Taylor or any other person. Danny is always a quiet spoken person and did what he was told and never bothered to even talk about anyone. LSK

Q. Whenever anyone was assigned to the Service Truck did they work out of the tool locker at the Bridge Track?

A. Yes, they all used the tools out of that box.

Signed: Louis S. Kornet

Witnessed: Al Carey

Lionel R. Beck

Jerry DeLiberato

PLAINTIFF'S EXHIBIT 736

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C. I. O. Local #1165

Number L8171-5

Date

Rec'd By [Illegible]

Name David Dantzler, Jr. Check No. 478

Address .....

Job ..... Dept. 120" Mill Div. Heating

Employee's Statement of Grievance

I, the undersigned, contend the Company iu discriminating against me in scheduling because of my color in the 120 Mill Pits the week of October 26, 1975.

I ask the Company to ceaue and desiut and to pay me all monetary lossed.

/s/ Geo Barrage Date Oct 27, 1975

First Step, Foreman's Answer:

Do not see any basis for this grievance but do believe that Dave Dantzler has an inferiority complex in making this statement. We do not show any partiality to any of the people who work in 120 mill but do make a sincere effort to comply with requests for special days off as was the case here.

Would suggest that Dave Dantzler check other heaters schedules and he would find that many schedules are split.

Grievance Denied.

Settled No Appealed to Next Step Yes

Signed Geo Barrage Signed ..... Date 11/20/75
(Foreman)

3rd Step—L.U. #1165 December 9, 1975

Grievance L-8171-5—David Dantzler Jr. #478, 120" Heating, Rolling—Rec. 11-13-75

'I, the undersigned, contend the Company is discriminating against me in scheduling because of my color in the 120" Mill Pits the week of October 26, 1975.

'I ask the Company to cease and desist and to pay me all monetary losses.'

UNION POSITION: The Union expressed concern with the fact that supervision by granting requested days off to certain employees infringed upon the schedule of the grievant. The Union requested that the Company provide it with work schedules for the week in question plus the two weeks prior.

COMPANY POSITION: The Company stated that during the week in question employee Whiteman requested that he be scheduled off on Friday and Saturday. The Company stated this request was granted. The Company stated it does not believe it discriminated against the grievant as contended in the instant grievance. The Company stated the Heaters' schedules vary and, there-

fore, it is necessary to split many schedules. The Company stated it attempts to equally distribute five consecutive day schedules amongst all Heaters to the greatest extent possible.

DISPOSITION: The Union will make a written reply to the Company within ten days in accordance with the terms of the current Labor Agreement.

Second Step Date rec'd by Sup't of Dept. .....

Same as Step #1

Settled No Appealed to Next Step Yes

Signed Geo Barrage (union) Signed ..... (Sup't) Date 11/20/75

Third Step: Date entered on Agenda .....

Modified Step 4—L.U.#1165 September 9, 1977

Grievance L-8171-5—David Dantzoer Jr. #478, 120" Heating—Rec. 11-13-75

> 'I, the undersigned, contend the Company is discriminating against me in scheduling because of my color in the 120" Mill Pits the week of October 26, 1975.
>
> 'I ask the Company to cease and desist and to pay me all monetary losses.'

UNION POSITION: Grievant Dantzler stated that he filed the instant grievance because he was not scheduled for five days the week of October 26, 1975 and less senior Heaters were scheduled five days.

COMPANY POSITION: The Company submitted the schedule and the grievant's time card as evidence of the fact that the grievant was scheduled five days during the week in question.

DISPOSITION: The Union will make a written reply to the Company within ten days in accordance with the terms of the current Labor Agreement.

PLAINTIFF'S EXHIBIT 739

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C. I. O. Local #1165

Number L-9409-5

Date 1-31-77

Rec'd By R [Illegible]

Name David Dantzler, Jr. Check No. 1603

Address .....

Job ..... Dept. 120" Mill Div. Heating

Employee's Statement of Grievance

I, the undersigned, contend the Company has discriminated against me on overtime January 22, 1977 when they gave junior Heaters and Helpers extra and denied me the opportunity to work. I ask the Company to cease and desist and to pay me all monetary losses.

/s/ Geo Barrage Date Jan. 26, 1977

First Step. Foreman's Answer:

This is the same grievance as L 9357-5. To date, Mr. Barrage and myself have been unable to establish an overtime agreement in spite of numerous hours spent on this subject. Every effort is being made to resolve remaining problems. Until such time, as there is an agree-

ment, the company has no obligation to this employee over other employees in this subdivision.

Settled No Appealed to Next Step Yes

/s/ Geo Barrage (union) /s/ [Illegible] (Foreman)

Date 1/31/77

Illegible Step Date rec'd by Sup't of Dept. 1/31/77

Same as step I.

Settled No Appealed to Next Step Yes

Signed Geo Barrage (Union Signed ..... (Sup't) Date 1/31/77

3rs Step—L.U. #1165 February 15, 1977

Grievance L-9409-5—David Dantzler, Jr. #1603, Heating—Rec. 1-26-77.

> "I, the undersigned, contend the Company has discriminated against me on overtime January 22, 1977 when they gave junior Heaters and Helpers extras and denied me the opportunity to work. I ask the Company to cease and desist and to pay me all monetary losses."

UNION POSITION: The Union stated that the instant grievance contends that the Company discriminated against the grievant because the Company gave junior Heaters and Helpers extras and denied the grievant the opportunity to work an extra as a Heater.

COMPANY POSITION: The Company stated that in the discussion with Grievance L-9457 the Union and the

grievant agreed that overtime should be rotated by going down the seniority list whether or not it involves heating overtime or helping overtime. The Company stated as a result of this discussion the Company rotated overtime in the instant grievance which lead to junior heaters and helpers being given an overtime opportunity as a heater and the grievant being offered an overtime opportunity as a helper which he refused. The Company stated that since the instant grievances were filed the Company has sat down with Committeeman Barrage and is close to formalizing an official overtime procedure for 120" Mill.

DISPOSITION: Grievance settled based on the fact that the parties are close to agreeing on an overtime procedure for the 120" Mill.

PLAINTIFF'S EXHIBIT 740

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C. I. O. Local #1165

Number L-9878-5
Date Aug. 19, 1977
Rec'd By R. J. Cole

Name David Dantzler, Jr. Check No. 1603
Address .....
Job ..... Dept. 120" Mill Div. Heating

Employee's Statement of Grievance

I, the undersigned, contend the Company is denying me the opportunity to work my share of the overtime. This is occurring in the 120" Heating subdivision. I ask the Company to cease and desist and to pay me all monetary losses because of this discriminatory action.

/s/ David Dantzler Date Aug. 17, 1977

First Step. Foreman's Answer:

Every effort is made to equalize overtime within the Heating Subdivision in accordance with the existing contract and verbal agreement.

Settled..... Appealed to Next Step ✓

/s/ David Dantzler
(union)

/s/ Robert J. Cole
(Foreman)
Tech Asst.
120 Mill

Date Aug. 19, 1977

Second Step Date rec'd by Sup't of Dept. .....

Same as Step 1

Settled No Appealed to Next Step Yes

/s/ George Barrage (union) /s/ [Illegible] (Sup't)

Date 22 Aug. 77

* * * *

3rd Step—L.U.#1165 October 7, 1977

Grievance L-987?-5—David Dantzler Jr. #1603, 120" Heating—Rec. 8-19-77

> 'I, the undersigned, contend the Company is denying me the opportunity to work my share of the overtime. This is occurring in the 120" Heating Subdivision. 'I ask the Company to cease and desist and to pay me all monetary losses because of this discriminatory action.'

UNION POSITION: The Union contended the Compay is denying David Dantzler, Check #1603, his proper share of overtime.

COMPANY POSITION: The Company stated the overtime is as follows:

Overtime Opportunities

1-19-77—Worked
1-22-77—Refused
1-30-77 to 4-7-77—off sick
4-13-77—Refused
5-9-77—Refused
5-12-77—Refused
5-12-77—Refused

The Company stated that Mr. Dantzler was dropped from the overtime list on May 13, 1977 because of three consecutive refusals and on August 19, 1977 was restored to the list as a result of a grievance. The Company stated that since August 19, 1977, Mr. Dantzler worked overtime turns on September 9 and again on September 12, 1977. The Company stated as of October 1, 1977 the overtime is as follows:

Teel	— 8	Whiteman	— 6
Finnefrock	— 9	Balestreri	—11
Killian	— 8	Huyard	— 9
Dantzler	— 7	Culbertson	— 8
Cox	—11	Madrigale	— 9
Fusco	—10		

The Company stated that any individual dropped from the overtime list for three consecutive refusals can be reinstated by requesting reinstatement.

DISPOSITION: Settled on the basis of the agreement between the Superintendent and the Committeeman.

DAVID DANTZER * 1603 GRIEVANCE L-9878-5

Overtime Opportunities

1/19/77	Worked	NOTE:	Off sick 1/30-4/7
1/22	Refused		
4/13	Refused		Off List—
5/9	Refused		3 Refusals 5/13-8/19
5/12	Refused		
5/13	Refused		

NOTE: 5/13 Dropped from list 3 refusals (consecutive)
8/19 Restored to list when grievance received.

9/9	Scheduled 6 days—Worked
9/12	Worked

As of 10/1	Teel	8
	Framefrock	9
	Killian	8
	Dantzler	7
	Cox	11
	Fusco	10
	Whiteman	6
	Ballistreri	11
	Huyaro	9
	Culbertson	8
	Madrigale	9

NOTE: Any individual dropped from list for 3 consecutive refusals can be reinstated by requesting to be reinstated.

PLAINTIFFS' EXHIBIT 744

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C.I.O. Local #1165

Number L-10034-5

Date 12/13/77

Rec'd by R. Cole

Name: David Dantzler, Jr. Check No. 1603

Address ———————

Job ——————— Dept. 120" Mill Div. Heating

Employee's Statement of Grievance

I, the undersigned, contend the Company is discriminating against me because of my color (scheduling younger men 6 days while scheduling me 5 days the week of December 4, 1977). I ask the Company to cease and desist and to pay me all monetary losses.

/s/ David Dantzler

Date: Dec. 12, 1977

First Step, Foreman's Answer:

No man, younger or older, was scheduled more than 5 days during the week of December 5, 1977. All overtime turns were filled in accordance with the existing overtime agreement. Grievance denied.

Teel—6 days
Finnefrock—6 days
Huyard—6 days
Heating

Settled: No Appealed to Next Step———————

/s/ David Dantzler (Union)

/s/ [Illegible] (Foreman)

Second Step

Same as step #1.

3rd Step—L.U. #1165 January 17, 1978

* * * *

Grievance L-10034-5—David Dantzler Jr. #1603, 120" Heating—Discrimination.

DISPOSITION: Withdrawn without precedent or prejudice.

* * * *

PLAINTIFF'S EXHIBIT 814

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C.I.O. Local #1165

Number L-5650-11

Date 2-25-72

Rec'd by T. J. Ryan

Name: John R. Hicks, III Check No. 5177

Address _____

Job_____ Dept.: Ht. Tr. & Fin. Div._____

Employee's Statement of Grievance

I, the undersigned, contend the Company violated ARTICLE XVIII of the current Labor Agreement when they discriminated against me on February 24, 1972. I ask the Company to cease and desist in this practice of constant discrimination and harassment towards me as an individual.

/s/ John R. Hicks, III

Date Feb. 25, 1972

First Step, Foreman's Answer:

To 4th Step.

* * * *

Step 4—L.U. #1165 June 7, 1972

Grievance L-5650-11—John R. Hicks, III, Check #5177, Cladding Sub., Heat Tr. & Fin. Dept.—Rec. 2-25-72

> "I, the undersigned, contend the Company violated Article XVIII of the current Labor Agreement when they discriminated against me on February 24, 1972.
>
> "I ask the Company to cease and desist in this practice of constant discrimination and harassment towards me as an individual."

UNION POSITION: The Union charged that the Company violated the discrimination clause in the Labor Agreement by denying the grievant an advance. The Union requested that the Company respond to the Union in writing as to why the advance was denied.

COMPANY POSITION: The Company stated that its policy regarding advances is that no more than three advances per year are to be granted to the extent of $30. The Company stated that Mr. Hicks was granted four advances in 1969, two at $30. The Company stated that in 1970, Mr. Hicks was granted six advances, three at $30. The Company stated that in 1971, Mr. Hicks was granted six advances, two at $30. The Company stated that in 1972, Mr. Hicks was granted one advance at $100. The Company stated that when Mr. Hicks again requested an advance on February 24, 1972, the Company did not feel that Mr. Hicks was worthy of an advance due to his record and, therefore, the advance was denied. The Company stated that it recognizes no contractual violation.

DISPOSITION: There are no provisions in the Labor Agreement covering pay advances to employees. The Company, therefore, cannot see how it can be [illegible in exhibit].

UNITED STEELWORKERS OF AMERICA
American Federation of Labor—
Congress of Industrial Organizations
Local Union 1165
750 Charles Street
Coatesville, Pa., 19320

November 16, 1972

P. T. Scull, Assistant
Manager—Labor Relations
Lukens Steel Company
Coatesville, Pa. 19320

Dear Mr. Scull:

The following grievances, heard in Fourth Step and remanded to Third Step, have been reviewed in Third Step with the result that the Union wishes them to be considered as withdrawn without prejudice and precedent.

L-5208-11
L-5650-11
L-5692-11
L-5693-11

Very truly yours,

/s/ James M. Quinn, Jr.,
JAMES M. QUINN, JR.,
Chairman
Grievance Committee

JMQ:nc

PLAINTIFF'S EXHIBIT 847

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C.I.O., Local #1165

Number L-5104

Date 5-3-71

Rec'd By P. T. Scull

Name: Lawrence Hubert Check No. #6025

Address: ———————

Job———————Dept.: Electric Fur. Div.: Melting

Employee's Statement of Grievance

I, the undersigned, contend the Company is violating the current Labor Agreement by unjustly suspending me on April 25th, 1971 on the 11 to 7 turn. I ask the Company to cease and desist in this practice and pay all monetary losses.

/s/ Lawrence Hubert

Date: April 29, 1971

First Step, Foreman's Answer

Direct to Third Step

* * * *

3rd Step—L.U. #1165 June 2, 1971

Grievance L-5104—Lawrence Hubert, Check #6025, EF Floor Sub., Melting Dept. Rec. 5-3-71

"I, the undersigned, contend the Company is violating the current Labor Agreement by unjustly suspending me on April 25th, 1971 on the 11 to 7 turn. "I ask the Company to cease and desist in this practice and pay all monetary losses."

UNION POSITION: None.

COMPANY POSITION: None

DISPOSITION: Held in abeyance.

Third Step—L.U. #1165 November 23, 1971

Grievance L-5104—Lawrence Hubert, Check #6025, EF Floor Sub., Melting Dept.— Rec. 5-3-71

"I, the undersigned, contend the Company is violating the current Labor Agreement by unjustly suspending me on April 25th 1971 on the 11 to 7 turn. "I ask the Company to cease and desist in this practice and pay all monetary losses."

UNION POSITION: The Union stated that the grievant had gone to the Melting Office and asked Clerk McFarland for time off to go to Detroit because his son had gotten in trouble. The Union stated that other employees have gotten off work for personal reasons and that Mr. Hubert should have been afforded the same consideration. The Union also claimed that the Company cannot force an employee to relay his personal business.

COMPANY POSITION: The Company stated that Mr. Hubert has a Company service date of 10-29-61 and has

established the following disciplinary record with the Company:

Date	Discipline	Reason
12-9-64	Written Warning	Off Job Without Permission
8-3-66	Written Warning	Poor Workmanship
1-6-67	Suspended 1 Week	Failure to Report Off
5-8-67	Written Warning	Incompetence or Failure to Meet Reasonable Standards of Efficiency
6-11-69	Written Warning	Deliberately Restricting Production or Persuading Others To Do So, Loafing on the Job or in the Locker Room or Toilet Rooms
8-14-70	Written Warning	Failure to Stay on Job
10-20-70	Written Warning	Habitual Absence From Work
4-25-71	Suspended 1 Week	Habitual Absenteeism

The Company stated that Mr. Hubert reported off his scheduled 11-7 turns, 4-22, 4-23, and 4-24-71, for personal business. Supervisor Hopton testified that he asked the grievant at the time he was accorded the instant suspension what was meant by personal business after telling the grievant that personal business was not a valid reason for being off work in view of the grievant's poor record of absenteeism with the Company. Supervisor Hopton testified that the grievant refused to relate what the personal business involved and, therefore, due to the grievant's record, he was accorded the instant suspension.

DISPOSITION: The Union will make a written reply to the Company within ten (10) days in accordance with the terms of the current Labor Agreement.

UNITED STEELWORKERS OF AMERICA
American Federation of Labor—
Congress of Individual Organizations

Local Union 1165
750 Charles Street
Coatesville, Pa., 19320

January 25, 1972

P. T. Scull, Assistant
Manager—Labor Relations
Lukens Steel Company
Coatesville, Pa. 19320

Dear Mr. Scull:

The following grievances are being submitted to the Fourth Step of the Grievance Procedure.

* * * *

L-5104

* * * *

Very truly yours,

/s/ James M. Quinn, Jr.
JAMES M. QUINN, JR.,
Chairman
Grievance Committee

JMQ:nc

4th Step—L.U. #1165 February 24, 1972

Grievance L-5104—Lawrence Hubert, #6025,
EF Floor Sub., Melting Dept.
—Rec. 5-3-71

"I, the undersigned, contend the Company is violating the current Labor Agreement by unjustly suspending me on April 25th, 1971 on the 11 to 7 turn. "I ask the Company to cease and desist in this practice and pay all monetary losses."

UNION POSITION: The Union stated it understands Mr. McFarland told the grievant he could take off due to personal business. The Union also stated it understands Supervisor Hopton told the grievant that personal business was not a valid reason for absence.

COMPANY POSITION: Supervisor Hopton testified that he told the grievant that personal business without any further explanation was not a satisfactory reason for absence in view of the grievant's previous record regarding absenteeism. Supervisor Hopton testified that he asked the grievant the reason he reported off for personal business, but the grievant refused to provide any explanation. Supervisor Hopton testified that had the grievant provided a satisfactory explanation for his absence, he would have given him the time off with permission and not taken any disciplinary action. Mr. McFarland testified that he does not recall giving the grievant time off with permission as alleged by the Union.

DISPOSITION: In view of the fact Mr. Hubert refused to give any explanation for his absence, the Company considers the suspension to be justified. The grievance, therefore, is denied.

4th Step—L.U. #1165 November 9, 1972

Grievance L-5104—Lawrence Hubert, Check #6025,
EF Floor Sub., Melting Dept.
Rec. 5-3-71

"I, the undersigned, contend the Company is violating the current Labor Agreement by unjustly suspending me on April 25th, 1971 on the 11 to 7 turn. "I ask the Company to cease and desist in this practice and pay all monetary losses."

UNION POSITION: The Union requested that the Company withdraw the instant suspension from the grievant's record without monetary losses.

COMPANY POSITION: The Company stated it feels the instant suspension was justified. Supervisor Hopton stated that it would not be fair to other men in the shop who have been similarly penalized if the Company were to remove the instant suspension from the grievant's record.

DISPOSITION: Withdrawn without precedent or prejudice.

PLAINTIFF'S EXHIBIT 848

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C.I.O., Local #1165

Number L-4687
Date 8/13/70
Rec'd By R. Erskine

Name: Local Union #1165 Check No. ———
Address: ———————
Job..... Dept.: Melting Div.: Floor

Employee's Statement of Grievance

We, the Local Union, claim that on July 25, 1970, the Company denied Lawrence Hubert, #6025, promotional opportunities by not allowing him to work 1st helper at the E.M.S. Floor.
We ask the Company to cease and desist in this action and to pay all monetary losses.

/s/ Carl Cannon
Date Aug. 11, 1970

First Step, Foreman's Answer:

Lawrence Hubert, Check No. 6025, was not moved to a temporary position of 1st Helper because he had not received any previous 1st Helper training and therefore is not qualified to fill this temporary vacancy.

It is the desire of the company to give 1st Helper training to qualified, older 2nd Helpers. A number of

2nd Helpers have been trained, but this training has not reached the seniority level of Lawrence Hubert.

Settled————Appealed to Next Step: Yes.

/s/ Carl Cannon
(Union)

/s/ R. Erskine
(Foreman)

Date 8-27-70

3rd Step—L.U.#1165 October 6, 1970

Grievance L-4687—*Local Union #1165, Floor Sub., Melting Dept.—Rec. 8-3-70*

"We, the Local Union, claim that on July 25, 1970, the Company denied Lawrence Hubert, #6025, promotional opportunities by not allowing him to work 1st Helper at the E.M.S. Floor.

"We ask the Company to cease and desist in this action and to pay all monetary losses."

UNION POSITION: The Union charged that on July 25, 1970, the Company denied grievant Lawrence Hubert, Check #6025, promotional opportunities by not allowing him to work as a 1st Helper at the Electric Melt Shop Floor. The Union stated that in the past 2nd Helpers have been moved to fill temporary vacancies as 1st Helpers even though they have not previously been trained as or worked as 1st Helpers. The Union charged the Company with discriminating against the grievant in this instance by refusing to move him to 1st Helper on the turn in question on July 25, 1970.

COMPANY POSITION: The Company stated that the vacancy in question is a temporary vacancy of one day's duration and, therefore, does not represent a promotional opportunity. The Company stated that since contractually it is the judge of ability and the instant

vacancy is a temporary vacancy, the Company recognizes no contractual violation. The Company stated that employee Minnier filled the temporary vacancy in question. The Company explained that employee Minnier is more senior to the grievant and has considerably more experience on the floor than the grievant and, for these reasons, the Company worked Mr. Minnier as a 1st Helper to fill the instant one-turn vacancy. The Company stated that Mr. Minnier has approximately seven years' experience on the floor as opposed to the grievant's experience of approximately one year. The Company explained further that the grievant had to be forced from the Degasser to learn how to 3rd Help in the past. The Company stated that Electric Melt Shop supervision is in the process of training 1st Helpers and submitted a list indicating that a number of senior employees to the grievant have yet to be trained as 1st Helpers. The Company stated that it sees no grounds for the Union's charge of discrimination and recognizes no contractual violation in the instant grievance.

DISPOSITION: Appealed to 4th Step.

4th Step—L.U.#1165 November 9, 1972

Grievance L-4687—*Local Union #1165, Floor Sub., Melting Dept.—Rec. 8-3-70*

"We, the Local Union, claim that on July 25, 1970, the Company denied Lawrence Hubert, #6025, promotional opportunities by not allowing him to work 1st Helper at the E.M.S. Floor.

"We ask the Company to cease and desist in this action and to pay all monetary losses."

UNION POSITION: The Union stated that on a previous turn supervision moved two 2nd Helpers up to 1st Helpers under similar circumstances when neither

2nd Helpers were qualified as 1st Helpers. The Union stated it is asking that the Company give the same consideration to the grievant.

COMPANY POSITION: The Company stated that it did not move the grievant up to the 1st Helper position because he had never received 1st Helper training and never worked as a 1st Helper. The Company explained that the normal procedure is to train 2nd Helpers on a piggyback basis in order to cover anticipated needs in the 1st Helper position. The Company explained that the previous instance referred to by the Union involved a situation where an unusually large number of 1st Helpers were off at the same time and after unsuccessful efforts in attempting to call out a 1st Helper, unqualified 2nd Helpers were moved up to the 1st Helper position. The Company stated that since the Union recognizes that employees must be trained as 1st Helpers prior to occupying the 1st Helper position, the Company will settle the instant grievance on a non-precedent basis.

DISPOSITION: The Company will pay the grievant the difference between 1st and 2nd Helper for eight (8) hours in settlement of the instant grievance on a non-precedent basis.

GRIEVANCE SETTLEMENT PAYMENT

To: Labor Relations Date .....

Ref: Grievance # .....

Employee: ..... Check Number .....

In complete settlement of the above grievance, the above employee was paid a total of ..... This payment was made by special/included in regular pay check dated ....., and was (1) ..... paid on regular payday ..... (2) ..... sent to Department Supt. .....

Copies: ✓ Labor Relations
..... Local Union
..... Employee
..... Dept. Supt.
✓ Local Union

/s/ Paymaster
Time & Payroll Deportment

11/27/72

Grievance #4687

Employee Lawrence Hubert Check Number 6025

$6.80

11/30/72 Paid on regular payday 12/1/72

PLAINTIFF'S EXHIBIT 879

5th Card
Employment Record of Mayo, William R. Social Security No. 162-28-1670 Date of Birth 12-16-35

Department	Check	Position	From	To	Disposition
Melt. Floor	H72	Degasser Helper	4- 1-75	7-29-76	Warning #43
Melt. Floor	H72	Degasser Helper	7-29-76		

#43 Warning Rule #19 Failure to use safety deviced and equipment provided for employee protection.

LUKENS STEEL COMPANY

4th card

Employment Record of Mayo, William R. Social Security No. 162-28-1670

DEPARTMENT	CHECK	POSITION	FOREMAN	FROM	TO	DISPOSITION
Met. & Dev.	H72	Mill Observer	J. Scott	5-11-67	8-12-67	Sick—Recalled
Melting-Floor	H72	3rd. Helper	R. Wetherhill	11-19-67	1-5-68	Laid Off #34
Met. & Dev.	H72	Mill Observer	H. Grubb	2-6-68	2-27-68	Warned #35
Met. & Dev.	H72	Mill Observer	H. Grubb	2-27-68	3-16-68	Recalled
Melting-Floor	H72	2nd. Helper	R. Wetherhill	3-17-68	7-2-68	Sick&L.O. #36
POOL	H72			9-15-68	11-30-68	Recalled #37
Melting-Floor	H72	2nd Helper	R. Wetherhill	12-1-68	1-19-69	Laid Off #38
Met. & Dev.	H72	Mill Observer	J. Scott	2-4-69	2-8-69	Recalled
Melting-Floor	H72	2nd Helper #39	R. Wetherhill	2-9-69	11-15-69	Laid Off #40
Observers	H72	Mill Observer #41	J. Scott	11-16-69	1-17-70	Recalled
Melt-Floor	H72	Degasser Helper	R. Wetherhill	1-18-70	7-19-74	Warning #41
Melt. Floor	H72	Degasser Helper		7-19-74	8-17-74	Warning #42
Melt. Floor	H72	Degasser Helper		8-17-74	3-4-75	Absenteeism-50
Melt. Floor	H72	Degasser Helper		3-4-75	4-1-75	Absenteeism-75

rule 21—incompetency
#40—Red. in Force—Eff. 11-15-69. Exer. J. C. in Observers on 11-16-69—#41—off Sick
#39—Recalled to Meeting Floor eff. 2-9-69—Sick #42—rule 24—abstenteeism
#38—Red. in Force—Eff. 1-19-69. Off Sick—Pool Eligible. Exer. Job Claim in Observers on 2-4-69.
#37—Recalled to Melting Floor Eff. 12-1-68—off sick.
#36—Red. of Force—Effec. 9-14-68—Off Sick—Pool Eligible
#35 Warned—Late Report Off
#34—Red. of Force—Eff. 2-3-68—Ex. J.C. in Observers—Eff. 2-4-68

Note: Recalled to Melting-Floor—Eff. 11-9-67

3rd card

Employment Record of Mayo, William R. Social Security No. 162-28-1670

DEPARTMENT	CHECK	POSITION	FOREMAN	FROM	TO	DISPOSITION
Melting	H72	Ex. Pit Helper	D. Gloven	9-2-64	9-6-64	Laid off #25
Observers	H72	Observer	C. Burke	9-15-64	12-23-64	Laid off #26
POOL	H72			12-28-64	1-2-65	Recalled
Observers	H72	2-C Observer	J. Scott	1-3-65	5-17-65	Warned #27
Observers	H72	2-C Observer	J. Scott	5-17-65	11-8-65	Warned #28
Observers	H72	2-C Observer	J. Scott	11-8-65	11-27-65	Transferred
Melting-Floor	H72	Degasser Helper	D. Gloven	11-28-65	10-8-66	Laid Off #29
Observers	H72	Mill Observer	J. Scott	10-16-66	10-29-66	Recalled
Melting-Floor	H72	E. F. Floor Helper	R. Wetherill	10-30-66	12-3-66	Laid Off #30
Observers	H72	Mill Observer	J. Scott	12-5-66	12-12-66	Acct. O/S Plt.
Melting-Floor	H72	3rd Helper #31	R. Wetherill	1-11-67	3-18-67	Laid Off #32
Met. & Dev.	H72	Mill Observer	J. Scott	3-21-67	3-25-67	Recalled
Melting-Floor	H72	3rd Helper	R. Wetherill	3-26-67	4-8-67	Acct. O/S Plt.
Met. & Dev.	H72	Mill Observer	J. Scott	5-8-67	5-11-67	Warned #33

#33 Warned—Late report off, illegal excuse
#32 Red. in Force Eff. 3-18-67—Exercised Job Claim in Observers.
#31—Recalled Eff. 1-8-67 Note: Red. of Force Eff. 4-29-67 Exercised J. C. in Observer Eff. 4-30-67
#—Red. in Force—Eff. 12-3-66. Exer. Job Claim in Observers on 12-4-66
#29—Red. in Force—Eff. 10-8-66. Exer. Job Claim in Observers on 10-9-66.
Note: Recalled 6-10-65 to Melting-Pits:Declined.
#26—Red. of force—eff. 12-24-64. #27 Late report off. #28 Late Report Off.
#25—Red. of force—eff. 9-8-64. Exercised job claim eff. 9-9-64 in Observers.

2nd card

Employment Record of Mayo, William R. Social Security No. 162-28-1670

DEPARTMENT	CHECK	POSITION	FOREMAN	FROM	TO	DISPOSITION
Melting	H72	Ex. Pit Helper #13	C. Alexander	7-25-62	8-2-62	Laid off #14
Cladding	H72	Handler #15	R. L. Bunting	5-7-63	5-14-63	Recalled #16
Melting	H72	Ex. Pit Helper	C. Alexander	5-15-63	8-31-63	Laid off #17
Misc. Labor	H72	Pool #18	H. Potter	9-9-63		Job Claim #19
Cladding	H72	Grinder	R. L. Bunting		12-28-63	Laid off #20
120" Shears	H72	Pool eff. 1-12-64		1-15-64	1-16-64	Sickness-PR #21
Gen. Labor	H72	Pool eff. 2-16-64		2-17-64	3-15-64	Transferred
Observers	H72	Mill Observer	H. A. Grubb	3-16-64	4-28-64	Warned #22
Observers	H72	Mill Observer	H. A. Grubb	4-28-64	5-27-64	Recalled
Melting-Pitts	H72	Ex. Pit Helper	D. Gloven	5-28-64	6-14-64	Warned #23
Melting-Pitts	H72	Ex. Pit Helper	D. Gloven	6-14-64	9-2-64	Warned #24

Note: Recalled eff. 4-3-64 to Cladding: Declined. #22 Absent without reporting off.
Note: Laid off eff. 2-21-64 from Cladding—had never worked there.
#21—Pool reassigned due to Medical Restriction-Temp.-No Grinding 2-13-64.
Note: Recalled eff. 1-29-64 to Cladding: off sick. #24 Habitual abstentee.
#20—Red. of force—eff. 1-6-64. #23 Habitual absenteeism-reporting off late.
#19—Job claim eff. 12-12-63.
#17—Red. of force—eff. 8-31-63. #18—Recalled eff. 9-8-63.
#16—Recalled eff. 5-8-68 to O.H.Pits.
#15—Recalled eff. 5-5-63 to Labor Pool.
Note: Recalled eff. 4-14-63 to Labor Pool—See Letter in File.
#14—Red. of force—eff. 8-4-62.
#13—Recalled eff. 7-23-62 to Melting-Pits.

PLAINTIFF'S EXHIBIT 932

August 18, 1977

TO WHOM IT MAY CONCERN:

Dear Sir:

My name is Leon Whitfield and I am a concerned bewildered and frustrated member of Local 1165 United States Steel located in Coatesville, Pennsylvania. I am only one member dissatisfied to this extent.

I am requesting an investigation into our Rank and File leaders and our Constitution in hopes of finding suitable cause to reorganize our Local to one that can be respected by Lukens Steel Company. If possible, I would like an audience with our Vice President or District Director in hopes of achieving this. We, as a Union at Lukens, are so laxed that Lukens is dictating terms as to our rights, etc. I would consider impeachment proceedings of all our present Rank and File officers, Staff persons included.

The seriousness of these findings are quite urgent. I request an immediate response and am ready to start petitions for impeachment proceedings only awaiting your response.

Yours truly,

LEON WHITFIELD
2944 N. Judson Street
Philadelphia, PA 19132

LW/acd

Oct. 6, 1977

Pittsburgh, PA.

Mr. Lynch

I forwarded this to you on 8-18-77. It came back 10-3-77 moved & left no address. So upon mailing it again I hope I can receive the response I didn't receive from our District Director of Dis. #7, Mr. McGehen.

Hoping to Hear From you soon.

Sincerely

/s/ Leon Whitfield

PLAINTIFF'S EXHIBIT 947

UNITED STATES STEELWORKERS OF AMERICA
CIVIL RIGHTS COMPLAINT FORM

Local Union #1165 District #— Check or Badge #480

Date March 6, 1921

Name of Complainant(s) Ramon L. Middleton

Address 342 Harry Road Tel. # 384-7288
Coatesville, Pennsylvania 19320

/s/ Ramon L. Middleton

Signature(s) of Complainant(s)

NATURE OF COMPLAINT

In the latter part of 1970, I was given a test and examination for a new job (Strand Casting.) This new system eventually caused my displacement and my being sent to the Labor Gang (Class #2). My previous job in Tiger Hot Top was (Job Class #8).

I never received any results of the examination or was ever told that I was accepted or turned down for the new job. Now I find that there are younger men than myself working on this new job.

I have discussed this with the following persons with no satisfactory results: John Muhs—Manager of Procedures and Facilities—no results. Carl Cannon—Grievance Committeeman and Chairman of the Civil Rights Committee discussed it with Mr. Muhs, who could not give him the reasons for Ramon's being rejected. Richard Jacks, who is assistant Committeeman also discussed it with Mr. Muhs with no results. Harry Cavuto—President of Local #1165, having discussions and talks with John Muhs found that the only reason I was denied the

job was because my foreman, Don Mathews kept me out. (This was to have been told to Harry Cavuto in confidence).

I charge that Lukens Steel Company has denied me the right to job up-dating and that this is discriminatory.

RELIEF REQUESTED

An immediate hearing to air all aspects of this case.

Monetary losses retroactive to the date when the younger men started in Strand Casting training.

An immediate action to be taken against Lukens Steel Company to insure that these discriminatory practices cease.

This alleged discrimination was based on (check):

Race ☒ Color ☐ Religion ☐ National Origin ☐

Sex ☐ Age ☐ and is with regard to (check):

* * * *

PLAINTIFF'S EXHIBIT 957

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C. I. O. Local #1165

Number L-4171

Date 3-4-69, 8:30 a.m.

Rec'd By P. T. Scull

Name Leroy Davis Check No. 4794

Address _____

Job _____Dept. Trans. & Serv. Div. Grinders

Employee's Statement of Grievance

I, the undersigned, claim the suspension given me as of March 2, 1969 is unjust. I ask the Company to reinstate me and compensate me with all monetary losses suffered because of their action.

/s/ Leroy Davis

Date March 2, 1969

First Step, Foreman's Answer:

Directly to 3rd Step.

* * * *

3rd Step—3/25/69

Grievance L-4171—Leroy Davis, Check #4794, Grinding Sub., Trans. & Services Dept.—Rec. 3-4-69

> "I, the undersigned, claim the suspension given me as of March 2, 1969 is unjust. I ask the Company to reinstate me and compensate me with all monetary losses suffered because of their action."

UNION POSITION: The Union stated that it feels the two-week suspension accorded Leroy Davis on March 2, 1969 is unjust. The Union stated that it has been informed by Mr. Davis that he took Grinders to the Electric Shop at approximately 3:15 p.m. and then went to the locker room. The Union stated that other Grinders were in the locker room along with Mr. Davis and they were not disciplined. The Union stated that it feels that Mr. Davis has been singled out as an offender and as an employee to be watched by supervision. The Union stated that small infractions which are overlooked when they involve other members of the gang are not overlooked when they involve Mr. Davis. The Union cited an example involving a Gang Leader singling out Mr. Davis. The Union also referred to an incident in which Mr. Davis requested permission from Foreman Sikora to see Mr. Muhs in the Labor Relations Department and was told to tell the Gang Leader that he was going to Labor Relations. The Union stated that when Mr. Davis complied with this request and went to Mr. Muhs' office, Mr. Muhs received a call from acting Supervisor Shaw charging Mr. Davis with being off the job without permission.

COMPANY POSITION: The Company stated that Leroy Davis, Check #4794, has a Company service date of December 11, 1959 and the following disciplinary record:

Date	Discipline	Reason
4-5-65	Written Warning	Habitual Absenteeism
10-3-65	1-Week Suspension	Habitual Absenteeism
7-2-68	Written Warning	Leaving Work Before Quitting Time & Arriving Late
7-3-68	1-Week Suspension	Leaving Work Before Quitting Time & Arriving Late
10-4-68	1-Week Suspension	Leaving Work Before Quitting Time —Off Job Without Permission
3-3-69	2-Week Suspension	Leaving Work Before Quitting Time

The Company stated that in the instant grievance it was unable to substantiate Mr. Davis' story that he took Grinders to the Electrical Shop. The Company pointed out that the normal procedure is for the Electrical truck to pick up Grinders. The Company emphasized that Mr. Davis was not directed by either the Gang Leader or the Foreman to take Grinders to the Electrical Shop. The Company pointed out that Mr. Davis has received one verbal warning, one written warning, two one-week suspensions and one two-week suspensions for leaving the job. General Superintendent Thompson testified that Mr. Davis when he is working is a good employee. Mr. Thompson stated that the problem has been one of keeping Mr. Davis on the job and stated that he does not feel that supervision has in any way been discriminating against Mr. Davis. The Company stated that a great deal of time and effort has been spent with Mr. Davis in an attempt to resolve this problem. General Superintendent Thompson offered to discuss this problem with Mr. Davis again in the presence of Mr. Davis' supervision and Chairman of the Grievance Committee, Mike Reach.

DISPOSITION: Appealed to 4th Step. In the meantime, a meeting will be held ————————————.

4th Step—L.U. #1165 April 28, 1971

Grievance L-4171—Leroy Davis, Check #4794, Grinding Sub., Trans. & Services Dept.—Rec. 3-4-69

"I, the undersigned, claim the suspension given me as of March 2, 1969 is unjust. I ask the Company to reinstate me and compensate me with all monetary losses suffered because of their action."

UNION POSITION: Grievant Davis testified that he took some burnt grinders to the Electric Shop from the Plan F area, returned to the 206" Grinding area, noticed that all the Grinders had left with the exception of the Gang Leader, and then went to the locker room. Mr. Davis testified that at the time he was accorded the instant suspension, he was told by Supervisor Shaw that another employee, Lester Moore, who had also left the Plan F area at the same time that Mr. Davis had, had been disciplined. Mr. Davis testified that Mr. Shaw never disciplined Mr. Moore until after he filed the instant grievance. Mr. Davis testified further that Supervisor Shaw asked Lester Moore to sign a statement that he had been disciplined. Mr. Davis testified that it is the unwriten law that Grinders take burnt grinders to the Electric Shop when necessary. The Union stated that it feels Mr. Davis was discriminated against and taking grinders to the Electric Shop is standard procedure and part of the Grinder's job to return tools and equipment.

COMPANY POSITION: The Company stated that Grinders do not take burnt grinders to the Electric Shop unless instructed to do so by supervision. The Company stated that Lester Moore was also disciplined at the same time as Mr. Davis, but only given a verbal warning based on his previous record. The Company stated, therefore, it does not feel that Mr. Davis was discriminated against, but rather that the suspension was just since Mr. Davis left the job early.

DISPOSITION: The Company has once again reviewed this grievance. The Company has not been able to talk to the supervisor who found Mr. Davis missing from his work place since the above hearing as he is absent from work due to illness. However, supervision in checking its records find that both Messrs. Davis and Moore were disciplined on the same day, March 3, 1969. Supervision cannot remember who was disciplined first. Supervision did ask Mr. Moore to sign the form which recorded the verbal warning extended to Mr. Moore. Both Mr. Moore and the Shop Steward, Mr. Garver, present at the hearing refused to sign the form. As a result of the review, the Company believes the suspension accorded to Mr. Davis was justified. The grievance, therefore, is denied.

PLAINTIFF'S EXHIBIT 961

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C. I. O., Local #1165

Number L-4183

Date 3-19-69, 8:30 a.m.

Rec'd By P. T. Scull

Name Leroy Davis Check No. 4794

Address _____

Job _____Dept. Trans. & Serv. Div. Grinders Sub.

Employee's Statement of Grievance

I, the undersigned, claim that the Company is constantly harassing me and that they are discriminating against me in daily assignments. I ask the Company to cease and desist in this practice.

/s/ Leroy Davis

Date March 18, 1969

First Step, Foreman's Answer:

Direct to 3rd Step.

* * * *

3rd Step
4/23/69

Grievance L-4183—Leroy Davis, Check #4794, Grinding Sub., Trans. & Services Dept.—3-19-69

> "I, the undersigned, claim that the Company is constantly harrassing me and that they are discriminating against me in daily assignments.
> "I ask the Company to cease and desist in this practice."

UNION POSITION: The Union stated that the instant grievance was filed as a result of supervision constantly harrassing and following Mr. Davis throughout his work area in the plant. The Union acknowledged that this problem has been discussed with supervision in Mr. Davis' presence since the instant grievance was filed.

COMPANY POSITION: The Company stated that since the instant grievance was filed, Mr. Davis' complaints have been discussed in detail and at considerable length with representatives of Operating, representatives of Labor Relations, representatives of Employment, and representatives of the Union in Mr. Davis' presence. Mr. N. J. Thompson, Mr. Davis' General Superintendent, stated that he is unaware of any further complaints on Mr. Davis' behalf since these meetings were held. The Union stated that it does not feel that Mr. Davis is in any way being discriminated against or harrassed, but that it is presently attempting to resolve some of Mr. Davis' problems and suggested that the instant grievance be held in abeyance pending the outcome of such action.

DISPOSITION: Held in abeyance.

* * * *

4th Step—3/25/70

Grievance L-4183—Leroy Davis, Check #4794, Grinding Sub., Conditioning Dept.—Rec. 3-19-60

> "I, the undersigned, claim that the Company is constantly harassing me and that they are discriminating against me in daily assignments.
> "I ask the Company to cease and desist in this practice."

UNION POSITION: None.

COMPANY POSITION: The Company stated that it is unaware of any further problems relative to the charges filed in the instant grievance. The Company stated that the grievant has four approved requests for transfer on file presently and is waiting to be called.

* * * *

4th Step—9-3-69

Grievance L-4184—Leroy Davis, Check #4794, Grinding Sub., Trans. & Services Dept.—Rec. 3-4-69

> "I, the undersigned, claim the suspension given me as of March 2, 1969 is unjust.
> I ask the Company to reinstate me and compensate me with all monetary losses suffered because of their action."

UNION POSITION: The Union stated that it is charging the Company in the instant grievance with discriminating against the grievant. The Union emphasized that employees often do things on their own. The Union noted that in this instance the grievant took it upon himself to take Grinders to the Electrical Shop. The Union noted that another employee, Lester Moore, was observed in the locker room at the same time that the grievant was ob-

served, but was only given a verbal warning at a later date. The Union referred to other instances of alleged discrimination involving the singling out of Mr. Davis by his supervision.

COMPANY POSITION: The Company stated that it has spent a considerable amount of time with the grievant concerning his problems. The Company pointed out that the chief problem as regards the grievant has involved absenteeism and leaving the job without permission. The Company pointed out that the grievant was previously assigned to the Flanging area where he threatened a supervisor. The Company pointed out that the grievant was then moved to the Plan F area where he again threatened a supervisor. The Company pointed out that since the most recent two-week suspension accorded the grievant, there apparently has been no problem. The Company stated that in this instance, no one directed the grievant to go to the Electrical Shop and no one at the Electrical Shop observed Mr. Davis. The Company stated that racism is not involved in the instant grievance since the grievant's foremen are both Negro and white.

DISPOSITION: The Company will make a written reply to the Union within ten (10) days in accordance with the terms of the current Labor Agreement.

* * * *

Final Settlement:

Date of Settlement 6-7-72

W.O.P.P.

PLAINTIFF'S EXHIBIT 1045

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C.I.O., Local #1165

Number L-9342-7

Date 1-4-77

Rec'd By H.J. Cabott

Name Harold K. Brown Check No. 5028

Address _____

Job _____ Dept. Ref. & Fuel Div. Misc. Labor

Employee's Statement of Grievance

I, the undersigned, contend the Company violated the current Labor Agreement on the 8-4 turn December 27, 1976 when they called a turn out for snow removal and did not call me as a Towmotor Operator and used a Laborer to do my job.

I ask the Company to cease and desist and to pay all monetary losses due me.

Signed Harold K. Brown Date January 3, 1977

First Step, Foreman's answer:

We will call a qualified [illegible] in this unit before going to labor in the future.

Settled Yes Appealed to Next Step /s/ H.J. Cabott 3-3-77

* * * *

PLAINTIFFS EXHIBIT 1046

LUKENS STEEL COMPANY
UNITED STEELWORKERS OF AMERICA
C.I.O., LOCAL #1165

Number L-10844-7

Date 1-16-79

Rec'd By HJ.. Cabott

Name Harold Brown Check No. 5028

Job ——— Dept. Ref. & Fuel Div. Misc. Labor

Employee's Statement of Grievance

I, the undersigned, contend the Company is denying me the opportunity to work at the Brickshed during EV vacation. I ask the Company to cease and desist and pray to be made whole.

Signed /s/ Harold K. Brown Date Jan. 15, 1979

First Step, Foreman's Answer:

Harold Brown is not an incumbent in the Refractory Handling Subdivision. For this reason he may not bump up, as per agreement with the Union and the Refractory & Fuel Department.

See enclosed letter.

Grievance denied.

Settled ——— Appealed to Next Stop ———

Signed ——— Signed /s/ [Illegible] Date Jan. 16, 1979
(Union) (Foreman)

* * * *

3rd Step—L.U.#1165 May 8, 1979

* * * *

Grievance L-10844-7—H. Brown #5028, Misc. Labor—Sen. Temp. Vacancies.

DISPOSITION: Held in abyenace for future 3rd Step meeting.

* * * *

3rd Step—L.U. #1165 July 3, 1979

Grievance L-10844-7—Harold Brown #5028, Misc. Labor—rec. 1-16-79

> I, the undersigned, contend the Company is denying me the opportunity to work at the Brickshed during EV vacation. I ask the Company to cease and desist and pray to be made whole.

UNION POSITION: The Union contends the Company is denying the grievant the opportunity to work at the Brick Shed during an EV vacation.

COMPANY POSITION: The Company respectfully requests that the instance grievance be remanded to 2nd Step for settlement between the parties. The Company stated the grievance has not been properly processed in the 1st and 2nd Steps of the grievance procedure.

DISPOSITION: The Company must request the instant grievance be remanded to 2nd Step so that proper procedures can be outlined in filling positions vacated by sickness or vacation.

PLAINTIFFS' EXHIBIT 1047

LUKENS STEEL COMPANY
UNITED STEELWORKERS OF AMERICA
C.I.O., LOCAL #1165

Number L-10845-7

Date 1-16-79

Rec'd By H.J. Cabott

Name Harold Brown Check No 5028

Job ———— Dept. Ref. & Fuel Div. Misc. Labor

Employee's Statement of Grievance

I, the undersigned, contend the Company is violating the current Labor Agreement by using 2 Laborers to perform the work of Sweeper Operator on January 12 and 15, 1979 at the EMS.

I ask the Company to cease and desist and pray to be made whole.

Signed /s/ Harold K. Brown Date Jan. 15, 1979

First Step, Foreman's Answer:

Labor job description states that they clean all areas, as designated by supervision, therefore grievance denied.

Settled No Appealed to Next Stop Yes

Signed /s/Benjamin Elliott (Union) Signed /s/ H.J. Cabott (Foreman)

Date Jan. 16, 1979

3rd Step—L.U.#1165 May 22, 1979

Grievance L-10845-7—Harold Brown #5028, Misc. Labor—rec. 1-16-79

I, the undersigned, contend the Company is violating the current Labor Agreement by using two Laborers to perform the work of Sweeper Operator on January 12 and 15, 1979 at the EMS.

I ask the Company to cease and desist and pray to be made whole.

UNION POSITION: The Union contends the Company used two Laborers to perform the work of the Sweeper Operator thereby denying the Sweeper Operator the opportunity to work overtime. The Company stated that Sweeper Operator Brown should have been called to work the overtime turn.

COMPANY POSITION: The Company stated there are normally two Sweeper Operators scheduled. The Company stated that one Sweeper Operator was off sick on January 12 and 15, 1979. The Company stated there was no other qualified Sweeper Operator. The Company stated two Laborers performed the sweeping job for the two days. The Company stated the work is properly covered under the job description of a Laborer and, therefore, fails to see where there is a violation of the contract.

DISPOSITION: Appealed to 4th Step.

Step 4—L.U.#1165 October 30, 1979

Grievance L-10845-7—Harold Brown, #5028, Misc. Labor—rec. 1-16-79

I, the undersigned, contend the Company is violating the current Labor Agreement by using 2 Laborers to

perform the work of Sweeper Operator on January 12 and 15, 1979 at the EMS.

I ask the Company to cease and desist and pray to be made whole.

UNION POSITION: The Union contends the Company used two Laborers to perform the work of Sweeper Operator, thereby denying the Sweeper Operator the opportunity to work overtime. The Union stated that Sweeper Operator Brown should have been called in to work the overtime turn. In addition, the Union indicated that the Company had placed employee Matthews to run the sweeper on Saturday instead of bringing Mr. Brown in to operate on an overtime basis.

COMPANY POSITION: The Company feels it is not under an obligation to work overtime when it has employees available to perform the work. However, in this particular case, there is some indication that the mechanical sweeper had been used and that the entire job was not done by hand. The Company feels that since insufficient information has been provided at ~~the~~ 4th Step, the grievance should go back to the 2nd Step to be resolved at that level where it should have been resolved in the first place.

DISPOSITION: The Company is requesting that this grievance go back to the 2nd Step to be resolved by Mr. Smith. In the event the grievance is not settled at that level, the grievance will be settled at a separate meeting between the Union and the Company at 4th Step.

PLAINTIFFS' EXHIBIT 1048

LUKENS STEEL COMPANY
UNITED STEELWORKERS OF AMERICA
C.I.O., LOCAL #1165

Number L-11168-7

Date [4-30-79]

Rec'd By ————————

Name Harold Brown Check No. 5028

Job ———— Dept. Ref. & Fuel Div. Brickshed

Employee's Statement of Grievance

I, the undersigned, contend the Company is denying me the opportunity to work at the Brickshed during the week of April 29, 1979 while the regular operator was off indefinitely.

I ask the Company to cease and desist and to pay me all monetary losses.

Signed ———————— Date April 30, 1979

* * * *

PLAINTIFF'S EXHIBIT 1216

SENIORITY UNITS

Actual Workforce for 1969

(Summer Hires Excluded)

[September 2, 1970]

Sub-Division	Average Number of Personnel			Percent of Each Group	
	White	Negro	Total	White	Negro
Electric Maint.	191.2	6.8	198.0	96.0%	4.0%
Flame Cut	84.2	14.0	98.2	86.0%	14.0%
S&M Sal. Yard	2.0	2.0	4.0	50.0%	50.0%
Heat Treat—APT	59.5	27.3	86.8	69.0%	31.0%
S&M Central Stores	11.6	0.0	11.6	100.0%	0%
120" Heating	12.4	1.0	13.4	92.0%	8.0%
120" Scales	7.3	0	7.3	100.0%	0%
120" Floor	37.3	6.0	43.3	86.0%	14.0%
120" Shears	0.0	17.0	17.0	0%	100.0%
120" Rolling	40.2	1.1	41.3	98.0%	2.0%
*140" Scales	6.5	0.7	7.2	90.2%	9.8%
Cond. Grinders	55.6	25.5	81.1	68.0%	32.0%
140" Heating	19.1	9.1	28.2	68.0%	32.0%
*140" Floor	20.6	1.7	22.3	92.3%	7.7%
*140" Gas Cut	21.9	5.1	27.0	81.0%	19.0%
*Spun Heads	52.9	.3	53.2	99.4%	.6%
140" Rolling	44.3	1.8	46.1	96.0%	4.0%
Cond. Steel Yds.	37.0	38.8	75.8	49.0%	51.0%
Presd. & Frmd.	4.0	0.0	4.0	100.0%	0%
Heat Trt. Clad.	80.4	56.1	136.5	59.0%	41.0%
Trans. & Serv. (Ship)	32.8	3.5	36.3	92.0%	8.0%
Melting—Pits	11.7	79.6	91.3	13.0%	87.0%
Trans & Serv. (Cond)	7.1	22.3	29.4	24.0%	76.0%
Trans & Serv. (Engr)	14.9	31.0	45.9	33.0%	67.0%
Trans & Serv. (Trucks)	41.9	6.4	48.3	87.5%	12.5%
Melting—Stk. Yds.	4.6	2.0	6.6	71.0%	29.0%
Melting—Floor	68.5	7.0	75.5	91.0%	9.0%
Heat Trt.—Pickling	21.0	13.1	34.1	62.0%	38.0%
Prsd. & Frmd. (P&P)	129.5	43.6	173.1	75.0%	25.0%
Elec. Power Station	16.4	1.4	17.8	94.0%	6.0%
Electric Cranes	315.3	32.6	347.9	91.0%	9.0%

Sub-Division	Average Number of Personnel			Percent of Each Group	
	White	Negro	Total	White	Negro
Prsd. & Frmd. (Pipe Fit.)	1.0	0.0	1.0	100.0%	0%
Prsd. & Frmd. (W'dale)	18.8	1.0	19.8	95.0%	5.0%
Ref. & Fuel (Fuel)	19.8	1.0	20.8	95.0%	5.0%
Ref. & Fuel (Pmp St.)	4.0	0.0	4.0	100.0%	0%
Ref. & Fuel (Boiler Hs)	6.6	5.8	12.4	53.0%	47.0%
Ref. & Fuel (Eqp. Rpr.)	7.3	0.0	7.3	100.0%	0%
Ref. & Fuel (Mis. Lbr)	4.0	8.0	12.0	33.3%	66.6%
Weld. Prod. (Insp)	16.4	2.0	18.4	89.1%	10.8%
Weld. Prod. (Rec&Shp)	2.0	0.0	2.0	100.0%	0%
Weld. Prod. (Straight)	2.0	0.0	2.0	100.0%	0%
Mach. & Forge (Roll Shop)	2.0	0.0	2.0	100.0%	0%
Machine & Force (Smith Shop)	22.9	0.0	22.9	100.0%	0.0%
Machine & Forge (Carpenter Shop)	25.2	0.0	25.2	100.0%	0.0%
Machine & Forge (Pattern Shop)	2.0	0.0	2.0	100.0%	0.0%
Machine & Forge (Loco. & Truck Repr.)	29.6	1.0	30.9	95.7%	3.2%
Mech. Pump	12.3	2.2	14.5	85.0%	15.0%
Mech. Lub.	35.8	0.0	35.8	100.0%	0.0%
Mechanical (Misc. Weld.)	41.1	5.0	46.1	89.0%	11.0%
Mech. Pipe Shop	51.8	2.0	53.8	96.0%	4.0%
Mechnical S.T.P.	13.8	3.0	16.8	82.0%	18.0%
Ref. & Fuel (Hot Top)	6.1	10.9	17.0	36.0%	64.0%
Welded Products (Welding)	51.2	2.2	53.7	96.0%	4.0%
Welded Products (Assembly)	15.0	1.0	16.0	93.7%	6.3%
Welded Products (Conditioning)	17.4	2.0	19.4	89.6%	10.4%
Machine & Forge (Machine Shop)	170.7	7.0	177.7	96.0%	4.0%
Welded Products (Cranes)	10.6	1.0	11.6	91.4%	8.6%
Mechanical A & M	147.1	10.7	157.8	93.0%	7.0%
Metallurgy (Obsrvs)	22.4	1.9	24.3	92.0%	8.0%

Sub-Division	Average Number of Personnel			Percent of Each Group	
	White	Negro	Total	White	Negro
Met. Development (Testing)	30.9	0.7	31.6	98.0%	2.0%
Met. Development (Inspection)	93.6	12.1	105.7	89.0%	11.0%
Ht. Trt. & Fin. (Vertical Blast)	25.6	13.9	39.5	65.0%	35.0%
Prod. Control (Heat Recording)	14.2	0.2	14.4	98.6%	1.4%
Ref. & Fuel (Masonry)	14.5	5.8	20.3	71.0%	29.0%
Mechnical—Riggers	31.1	3.0	34.1	91.0%	9.0%
Trans & Services (120" Labor)	1.0	1.3	2.3	43.0%	57.0%
Trans & Services (140" Labor)	0.0	3.0	3.0	0%	100.0%
Trans & Services (Trucks)	0.0	4.0	4.0	0%	100.0%

September 2, 1970

POOL

HOURLY WORKFORCE

(Summer Hires Excluded)

Sub-Division	Average Number of Personnel			Percent of Each Group	
	White	Negro	Total	White	Negro
Pool I	21.0	9.0	30.0	70.0%	30.0%
Pool II	4.8	1.0	5.8	83.0%	17.0%
Pool III	45.4	103.6	149.0	30.0%	70.0%
Pool IV	19.6	16.4	36.0	54.0%	46.0%
Pool V	38.6	51.1	89.7	43.0%	57.0%
Pool VI	30.9	14.7	45.6	68.0%	32.0%
Pool VII	15.6	35.2	50.8	31.0%	69.0%

PLAINTIFF'S EXHIBIT 1326

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1165
AFL CIO CLC

We, the hourly employees of Pressed and Formed Products, do hereby express our great concern for the extremely low morale that is obvious in our area due to various conditions which are not necessarily beyond our control if cooperation between Management and the hourly employees can be obtained. The general conditions which we would like reviewed are as follows:

1. Unjust suspensions and disciplinary actions taken against the hourly employees.
2. Management's impassive concern for hourly employees and welfare of Lukens.
3. Management's general lack of concern for working conditions in the shop.
4. Management's continuous efforts to create social and racial differences among the hourly employees.
5. A general lack of respect for our contract by Management.
6. Management's failure to comply with pollution equipment provided for in our contract.
7. Of utmost importance is Management's policy, particularly regarding Department Superintendent Sam Miller.

We feel that if the Company is truly serious in striving for harmonious relationship with the hourly employees, they will consider the above conditions to be reviewed in a just and equitable manner.

[93 signatures omitted]

PLAINTIFF'S EXHIBIT 1328

BEFORE

EDWARD E. McDANIEL, ARBITRATOR

Grievance No. L-10380-1

In the Matter of Arbitration

Between

LUKENS STEEL COMPANY
Coatesville, Pennsylvania

and

UNITED STEELWORKERS OF AMERICA
Local Union No. 1165

Issued: October 24, 1978

OPINION AND AWARD

Subject: Suspension and Discharge—On Fighting and Insubordination

Appearances:

FOR THE COMPANY:

Thomas J. Ryan, Manager, Labor Relations

P. T. Scull, Assistant Manager, Labor Relations

W. J. Whiteman, Staff Representative, Labor Relations

S. L. Miller, Superintendent, Pressed and Formed Products

Dr. W. L. Vernon, Medical Director

FOR THE UNION:

San Santoro, Staff Representative
Benjamin Pilotti, Local Union President
James Brown, Chairman, Grievance Committee
Ray Gardner, Grievanceman
Thomas E. James, Grievanceman
Edward Mayo, Witness
Frederick Hick, Witness
James P. McElhone, Witness
James Boggs, Witness
Alfred Hicks, Grievant

Statement of the Grievance:

"I, the undersigned, contend the Company unjustly discharged me June 26, 1978.

"I ask the Company to reinstate me, strike this mark from my record and pay me all monetary losses."

Contract Provisions Involved:

Articles II and IX of the August 1, 1977 Basic Labor Agreement.

Procedural Data:

Grievance Filed:	June 26, 1978
Appealed to Arbitration:	July 26, 1978
Heard in Arbitration:	September 26, 1978
Transcript Received:	None
Briefs Filed:	None

Statement of the Award:

The instant grievance is sustained to the limited extent (1) that the discharge penalty is set aside, in favor of extended period of disciplinary suspension and (2) that the grievant is ordered reinstated, without consideration of back pay, therefore—pursuant to the Findings herein.

GRIEVANCE

This grievance, from the Pressed and Formed Products Department, protests suspension and discharge actions against the grievant—upon "fighting" and "insubordination" charges, by Management—as without adequate "proper cause" therefor, under the Parties' Basic Labor Agreement.

BACKGROUND

On June 17, 1978, the grievant was a regular Shearman job incumbent (with a 1962 service date) at the Coatesville (Pennsylvania) Plant. On that date—following approximately sixteen (16) years of good service and conduct—he was suspended and, subsequently, was discharged from his employment. Specifically, the grievant was suspended (and, subsequently, discharged) by the Company, pursuant to a written notice thereof, which read:

"NOTICE OF DISCIPLINARY ACTION

"TO: [Grievant], Check#. . . DATE: June 19, 1978

"THIS IS TO GIVE YOU FORMAL NOTICE THAT THE FOLLOWING DISCIPLINARY ACTION HAS BEEN TAKEN AND A RECORD OF SUCH PLACED IN YOUR PERSONNEL FILE IN THE EMPLOYMENT DEPARTMENT OF LUKENS STEEL COMPANY.

☒ SUSPENSION DATING FROM June 19 TO June 23, 1978 INCLUSIVE

REASON: Fighting & Insubordination

☐ DISCHARGE EFFECTIVE DATE ———

REASON: ———

"I ACKNOWLEDGE NOTIFICATION OF THE ABOVE ACTION, AS REQUIRED UNDER THE TERMS OF THE LABOR AGREEMENT DATED AUGUST 10, 1969.

"SIGNED /s/ [Grievant] DATE 6/20/78"

In this case, the record shows that the grievant was suspended and discharged following complaints by his Plant Superintendent, S. L. Miller, that he (the grievant) had "grabbed" and "cursed" him (the Superintendent), during an encounter (at work) on June 18, 1978. Here, as the Company record reads:

> "Superintendent Miller testified that he had a contractor installing new metal shelving next to the Shears and went out to observe the job. Superintendent Miller testified that when he went to return to his office, he was stopped by employee [grievant] who said, 'What do you want from me?' Superintendent Miller testified that he did not understand and employee [grievant] continued to ask him what he 'wanted from me?' Superintendent Miller testified that employee [grievant] was close to his face and cursing. Superintendent Miller testified that employee [grievant] continued to talk loudly and he was concerned because he did not want a physical confrontation, so he turned to leave. Superintendent Miller testified that employee [grievant] then grabbed him by the arm and turned him around. Superintendent Miller testified that employee [grievant] grabbed by very hard and was yelling at him. Superintendent Miller testified that Ed Mayo and [grievant's brother] restrained grievant . . . by grabbing him to calm him down. Superintendent Miller testified that he then left and, as he was leaving, he turned around and observed grievant . . . pursuing him, saying things to him like 'meet me outside.' Superintendent Miller testified that he went to his

> office accompanied by employee Mayo. Superintendent Miller testified that he has had heated discussions in the past, especially with regard to the job evaluation of Shears jobs with [grievant] and others, but no one has ever threatened him nor grabbed him. Superintendent Miller testified that he felt [grievant's] challenge to meet him outside was a threat since if he wanted to talk with him, he "could have done that inside the plant. Superintendent Miller testified that grievant . . . did not curse him personally, but did curse during the discussion. Superintendent Miller testified that he was frightened and concerned over the entire incident and immediately called the Manager of Labor Relations, Thomas Ryan."

The grievant and Union denied that he had grabbed or cursed Superintendent Miller—or that he, otherwise, had "fought" or been "insubordinate" with him—as claimed by the Company. And, as the Union record reads:

> "The Union stated that while the grievant may have cursed, he did not threate[n] Mr. Miller nor grab Mr. Miller. The Union believes the discharge is unjust and seeks the return of the grievant with all monetary losses. Grievant . . . testified that he had a discussion with Superintendent Miller about crane delays and when Superintendent Miller turned around and left, it irritated him and he followed Superintendent Miller for a short period to get his attention. Grievant . . . testified that employee Boggs stepped in front of him and his brother advised him to go to First Aid because he was extremely nervous."

In any event, following a formal hearing on the matter, on June 26, 1978, the grievant had been declared guilty of both offenses charged and his suspension had been converted to discharge, as of that date. Thereupon,

the instant grievance arose, and the matter was processed for review in arbitration.

SUMMARY

At the hearing, as in the grievance procedure, the Company and its witnesses insisted that the grievant, in fact, had "fought" his Superintendent and had been "insubordinate" with him—as was charged. There, Superintendent Miller testified:

> "On June 19, I went to the back end of the Shop, to the West End, to check on the progress of certain metal shelving being installed in that area.
>
> "I stopped at the 108 Press, walked along the side of the No. 2 Shear and was approached by the grievant who asked if he could speak to me.
>
> "I said, 'Yes.' He said, 'What do you want from me?' I said, 'I don't know what you're talking about.' This was in the walkway near the Shear.
>
> "The grievant, then, said 'Ever since you came out here, it's been Sam Miller this and Sam Miller that.' He began to talk loudly and to use profanity.
>
> "As I turned to walk away, he grabbed me hard by the arm. Two other employees then came over and stepped between us. The grievant then said, 'Why don't you meet me outside like a man?' or words to that effect.
>
> "As I walked away, Ed Mayo, one of the employees there, followed me to the office saying [grievant] was upset and that I should not pay any attention to him."

Upon cross-examination, notably, the Superintendent added:

> "[The grievant] did not curse me, personally. But, he did a lot of cursing.

"When he grabbed my arm, I was frightened for my safety and well-being. I felt that he was trying to restrain me.

"I felt this because I was grabbed hard and because [the grievant] was angry at the time.

"When he had approached me, initially, the grievant accused me of taking away crane delay time from the incentive covering his crew. At the time, I did not know what he was talking about.

"In any case, he became incoherent, and was getting on top of me—quite close. It was then that I had turned away and that he had grabbed me by the arm.

"Employees Mayo and the grievant's brother had been working on another Shear nearby. I believe they were the ones who stepped between us.

"I went to my office and called Tom Ryan. He came out immediately. I did not talk to the grievant again."

Whether the grievant, in fact, had "grabbed" the Superintendent is in some dispute, on the evidence. The grievant claims not to have done so—or, not to "recall" having done so, at least—at any time. The grievant denies having had any intentions of causing bodily harm to the Superintendent, and denies that he had "fought" the Superintendent, in any event. And, he denies having cursed or threatened Superintendent Miller.

That the grievant had grabbed the Superintendent by his arm, however, is supported by the testimony of Plant Doctor Vernon who, shortly, thereafter, had been visited by the grievant. As Doctor Vernon testified:

"The grievant came to me with his brother at about 10:20 a.m., saying he felt shook up. He said he had been 'bugged' by Superintendent Miller; that

Miller had been pushing for more work from him and his crew.

"His brother told me that the grievant had had some personal and family problems and asked if I could give him something for his nerves.

"When I talked to the grievant, I am certain he said he had 'grabbed' Miller. His brother said that he had been easily upset, because he was having financial and marital problems at home. I do not recall any reference to Miller having said 'that's it,' by anyone."

The grievant appeared and testified on his own behalf at the hearing. There, he reported:

"When Miller came down by the Shears, I asked, 'Why are you trying to take the hour and a half off the crane?' I told him we were doing all we could; that it looked as though he would never be satisfied.

"He said, 'I can do what I want to.' He turned to walk away, and, then, turned around again saying, with his finger pointed up, 'You've had it.'

"Mike Boggs came over and said, 'Leave him alone; you can't talk to him.' Mayo and [my brother] never had to come between me and Miller.

"My brother did go with me to the Dispensary. I told Doctor Vernon that Miller and I had had an argument, and that I was upset.

"I did not tell Doctor Vernon I had grabbed Miller. I had been treated by Doctor Vernon before, when I got a finger cut off at work.

"When I went to Doctor Vernon, I did not say I had had marital or financial problems. I did not tell him that. My brother did talk to Doctor Vernon alone, and I don't know what my brother had said.

"The Nurse gave me something. I asked her for something for my nerves. I had never had any-

thing for my nerves before, but I took the pills she gave me and went home.

"I spoke to Miller like I did because they had put a remote control unit in and we had heard that crane delay time would be taken away from us in our incentive.

"I just wanted to ask why he was going to take away the delay time. The remote control unit had been in for five or six months. And, we, still, had been paid the one and a half hour delay time.

"Miller had said he could do anything he wanted to. I had followed him, saying, 'Mr. Miller, why don't you stop and talk to me like a man?' I said, 'What are you trying to do, kill me? I'm trying to get the work out for you.'

"I did not curse the Superintendent. I never told him to meet me outside to fight me or threatened him at any time either."

Employees Ed Mayo, James Boggs, Jim McElhone and a brother of the grievant appeared and provided corroborative testimony at the hearing. Claiming to have heard only a *part* of the discussion between the grievant and Superintendent Miller, Ed Mayo reported:

"Coming from the washroom to the Shear area, I had heard [the grievant] ask Miller, 'What do you want from me?' Sam turned and walked away. Sam turned again and said, 'You've had it.'

"I went down to Miller's office. He was pacing back and forth. He said, 'Come on in.' I said, 'What did you mean he'd had it?' He did not answer. He was quite upset.

"I never saw grievant touch Miller. And, I did not tell Sam he should overlook the incident. I had just wanted to know why a man of his knowledge and position would say what he did.

"Sam did not tell me [grievant] had grabbed him, and I saw nobody step between the grievant and Superintendent Miller."

Union witness James Boggs, likewise, denied having seen the grievant "grab" Superintendent Miller. As Boggs testified:

"Miller was approached by [grievant] asking why he was taking the one half hour delay time from his crew. I said to [grievant], 'Just let it go. Let it be.'

"I did not see the grievant grab Miller. I did get between the grievant and Miller, telling the grievant to be cool. I said, 'Let it be. You can't talk to him.'

"The discussion was getting heated at the time. But, at no time did I see [grievant] put his hands on Miller."

Employee Jim McElhone, who, also, had been present, at the time, testified:

"I saw [grievant] leave his Shear and approach Superintendent Miller. Miller walked away while the grievant was still trying to talk to him.

"I did not see Mayo or Fred trying to go between the two men. I did see Boggs get between them.

"I heard no threats. I did not see anybody grab anybody. And I heard no cursing.

"I was there all the time and I had followed the grievant. I only heard loud voices."

The grievant's brother, Fred, testified, finally:

"I came in on the tail-end. I'd been working in the 28 Shear area when Sam was walking away. I heard Sam say, 'That's it.' I never stepped between my brother and Miller. I heard nothing but, 'that's it.'

"I walked over and [grievant] said, 'What did he mean by that?' Then, I walked him over to first aid.

"When we got there, Mr. Ryan was there. Ryan said, 'I see he's pretty cool.' He said, 'You know your brother is being discharged?' I said, 'For what?' He said, 'For fighting.' I said, 'For what?' He said, 'That's what you heard.'

"I had seen Tom Ryan before we saw Doctor Vernon. I'd asked Ryan if I could go with my brother to Doctor Vernon's office.

"I told Doctor Vernon that my brother was nervous because Miller had said 'that's it.' I did not tell Doctor Vernon about any financial problems [grievant] may have had. I had said only that my brother was upset because Miller had said, 'that's it.' "

The Company insists that the grievant, indeed, had grabbed and threatened Superintendent Miller, as charged. Because of this conduct, it contends that "proper cause" had existed for his suspension and discharge, under the Parties' Agreements. And, it claims that this conduct violated published Plant Rules and Regulations thereagainst, which, specifically, had read:

"An employee will be subject to disciplinary action ranging from a warning to discharge from the company—depending on the type of offense, the employee's record with the company, and other factors—if he commits any of the following acts:

* * * *

"4. Insubordination (including refusal or failure to perform work assigned) or the use of profane, abusive or threatening language. . . .

* * * *

"FIGHTING ON COMPANY PROPERTY

"In order to eliminate fighting with or striking another employee on company property, the following penalties are in effect:

"First Offense—Suspenion [discharge]. . . ."

But, as the grievant and Union deny any such misconduct, the basic issue remains whether his suspension and discharge had been without sufficient proper cause therefor—in fact—under the Parties' Agreements.

FINDINGS

The Company evidence would indicate that the grievant, both physically and verbally, had assaulted Superintendent Miller. It tends to suggest, further, that he would have continued this course of conduct had he not been restrained therefrom, by fellow employees. Specifically, the grievant is said to have grabbed the arm of his Superintendent; invited the Superintendent to "fight" with him; and, had used threatening, profane and/or abusive language towards his superior, in the process—at the time.

Union evidence, however, is contrary. It indicates that the grievant, intentionally, had not grabbed the arm of his Superintendent; that he had not used threatening, abusive or profane language *towards* him; and, had not engaged in and/or *invited* any "fight" with him at any time. Its witnesses to the incident allowed only that there was "loud talk" and, possibly, some use of profanity—though not directed "towards" Miller and, otherwise, not in any abusive or threatening manner.

In any case, to say that the grievant engaged in a "fight" with his Superintendent, would seem to stretch the facts somewhat, in the situation presented on this record. It well may be that the grievant had surprised or "shook up" the Superintendent. But, that he had had any real intent to cause him bodily harm, quite clearly, has

not been demonstrated. And, though he well may have grabbed the arm of his Superintendent, this contact with his person seems to have been intended, merely, to detain this superior long enough for him to hear out the complaints of the grievant.

Such physical restraint, though improper perhaps, reasonably, did not constitute any act of *fighting* with the Superintendent. Any grabbing or holding would seem to have been of such short duration, moreover, that it, alone, had not constituted any serious restraint upon the movements of the Superintendent. And, while the evidence would seem to indicate some use of "profane" language by the grievant, it, admittedly, had not been intended nor taken to have been directed—as such—towards the Superintendent.

Here, though uttered in apparent anger, any "profanity" might be deemed of the nature of "shop" talk—which, normally, could not be taken as "insubordination" by the user. But, when *combined* with an actual physical restraint (however briefly) of his Superintendent, the angry use of such words—in resistence to a refusal by the Superintendent to hold any discussion with him—did, indeed, smack of insubordinate conduct here, on the part of the grievant.

That the grievant was disciplined upon specific charges of "fighting" his Superintendent *and* for being insubordinate to him, however, are critical to any proper and final disposition of the instant grievance. In the absence of any clear showing that the grievant was guilty of *both* such offenses, it cannot be concluded that he would have been suspended and discharged for any *single* one of these, at the time—by the Company. Thus, a determination of whether proper cause existed to support a discharge for fighting *and* insubordinate misconduct, would seem unnecessary—on the precise facts involved herein.

In sum, since the grievant is not shown to have engaged in any "fight" with his Superintendent, his discipline for *that* conduct finds no "proper cause" basis of support, under the Agreement. His suspension and discharge for fighting *and* insubordination, accordingly, could not stand. Only his "insubordination" offense, here, properly, should have been considered—in its discipline of the grievant, overall—by Management. Its *discharge* penalty will be set aside, therefore—in favor of an extended period of disciplinary suspension, for the "insubordination" by the grievant—upon these Findings.

AWARD

The instant grievance is sustained to the limited extent (1) that the discharge penalty is set aside, in favor of an extended period of disciplinary suspension and (2) that the grievant is ordered reinstated, without consideration of back pay, therefore—pursuant to the Findings herein.

Findings and Award issued
pursuant to Article VII of
Parties' Basic Labor
Agreement, by

/s/ Edward E. McDaniel
EDWARD E. MCDANIEL
Arbitrator

October 24, 1978
Pittsburgh, Pennsylvania

PLAINTIFF'S EXHIBIT 1338

July 11, 1974

Mr. N. J. Domangue
Manager, Personnel Administration

Roman Sobczynski and Alexander Norman
(F. W. Nill letter of July 5, 1974)

Dear Norris:

The attached letter from Fred Nill regarding the above employees is self-explanatory.

I am in agreement with this request, and solicit your approval of same.

Very truly yours,

D. O. GLOVEN
Manager of Steel Plants

cc: F. W. Nill

July 5, 1974

Mr. William Smith
Supervisor Employment

Subject: Roman Sobczynski and Alexander Norman.

Dear Bill:

I have been using Roman Sobczynski and Alexander Norman as temporary foreman in the Steel Yards. Both men have demonstrated that they have the necessary qualities and job performance to be put on as permanent foremen.

Mr. Alexander Norman has taken the AVA and Wunderlich and per your comments is acceptable to be a permanent foreman.

Mr. Roman Sobczynski has taken the AVA and Wunderlich several years ago and failed. The language barrier and because he was educated in a foreign land hinder him from being tested properly. He has requested that he not take the Wunderlich test to again confirm that he cannot pass the test. I am personally sympathetic with this response and hence hope you will approve that he only be required to take the AVA.

I also fully understand that these men must attend subsequent foremans school when they are made available.

Very truly yours,

/s/ F. W. Nill
F. W. NILL
Supt. of Conditioning

cc: D. O. Gloven
W. J. Domangue
E. Ross
J. Hall

PLAINTIFF'S EXHIBIT 1368

Sherman Walker

Terry Lanvanter

"Else" ?

Alvin Jones

Ralph Miller

Jhon Wilcoxs

B. Stamper

Bill Gilbert

Mike Towber

PLAINTIFF'S EXHIBIT 1369

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1165
AFL CIO CLC

Special Meeting July 13, 1978

Called by Management, George Copeland

Attending Union	Management
Dille Tucker	Tom Ryan
Ray Gardner	Tom Schull
Edward Mayo	E. Fogeleman
Fred Hicks	George Copeland
Bob Cornett	
Don Smith	
Yi Brown	
Benny Pollotti	

Follow Up July 27, 1977

Union	Management
Yi Brown	G. Copeland
Ray Gardner	T. Ryan
Fred Hicks	T. Schull
Ed Donie Mayo	S. Miller
Benny Pilotti	E. Fogelman
Paul Greger	
Don Smith	

PLAINTIFF'S EXHIBIT 1400

June 2, 1965

Human Relations and Labor Relations of Lukens Steel Company
Coatesville, Pennsylvania

Dear Sirs:

We have been in consultation with interested parties, with the intent to do all that is in our power to improve the situation of employment. We desire your full cooperation in these matters which will ultimately be of great benefit to the firm of Lukens Steel Company of Coatesville. We are not launching on a program to disrupt the labor relations, we are specifically of the intent to improve the situation for all employees.

Therefore, we are requesting that several items listed in our materials herewith be thoroughly read and considered.

We would like to have your response to this information in the form of your reactions for a conference within five days after receipt of this letter.

Cordially yours,

Open Hearth Pitmen Committee

Donald L. Parker	Alfonso Jones
Carl Cannon	James L. Thompson
Isaac W. Smith	James Hines

OPEN-HEARTH'S (Number Three Shop) COMPLAINTS

I. Incentive System in the Open Hearth Pits.

A. Apathy and indifference in bargaining.

II. Unsafe Working Conditions.

A. Overhead Hazzards.

1. Electrical repairmen carelessly leaving tools and parts on the crane's bridge which endangers limb and life of the pitmen.

B. Floor personnel throwing, shovelling their scrap, dirt and other debris in to the pit area.

C. The blasting out of tap holes without giving ample warning to pit personnel.

III. Classification.

A. Reclassifying of the first man who is now classified lower than his crane operator. The former is class ten (10), and the latter is class twelve (12).

1. The first man is held as the responsible person for that furnace in which he is working.

B. General look at reclassification

IV. Supervision, arbitrary and discriminatory actions

A. General disrespect of other men as individuals.

B. The open Hearth's furnace are being run faster and each man must be pulled hard to keep abreast. We feel that many disciplinary actions are arbitrary and unfair akin actions of Wallace's State Troopers, namely these:

1. Charles Beamsderper (Assistant Supervisor)
2. Earl Done (General Foreman)
3. Angelo Mancuso (Foreman)
   (a) Pushing beyond what is normally called fit.
   (b) Too demanding and intimidating.
   (c) No respect for a man as a man.
4. Dominic Merianna (General Foreman)

C. Report Offs

1. A man should be judged according to his previous record not according to the record of another man.

2. Men reporting off (personal business) excuses should be respected and not made public.

D. Suppressed fears of arbitrary actions by immediate and higher supervision for questioning or discussion of procedures, conditions of areas of which.

E. In the Electrical Department it has been known that a man has went to Mr. Smale and was refused the opportunity of working ladle crane without even being given a chance. We believe there is discrimination through the employment office.

LUKENS' EXHIBIT #27

1971-1977 ALL NON-CRAFT HIRES BY WEEK

Hired Week Ending	Total Hired White	Black
* * *		
02-08-75	8	7
02-15-75	4	
03-15-75	2	
09-11-76		1
Total	1037	515
* *	* *	

LUKENS' EXHIBIT 40

LUKENS GRIEVANCE REPORT 1976-1980

Cat. Code	Description	Blacks		Whites		Total
		Freq.	Pct.	Freq.	Pct.	Freq.
010.31000	Contracting out	1	2.33	42	97.67	43
010.32000	Supervisors Working	41	15.71	220	84.29	261
010.33000	Bargaining Unit Scope	0	0.00	0	0.00	0
030.11000	Disc. Absenteeism	80	43.24	105	56.76	185
030.14000	Disc. Insubordination	31	35.63	56	64.37	87
030.18000	Disc. Other Plant Rules	80	39.41	123	60.59	203
030.30000	Disc. Procedure	1	50.00	1	50.00	2
030.50000	Disc. Drugs/Alcohol	4	100.00	0	0.00	4
040.10000	Discrimination	5	55.56	4	44.44	9
040.20000	Intimidate/Coerce/Harass	13	32.50	27	67.50	40
050.20000	Prob/Prov Terminations	3	75.00	1	25.00	4
080.00000	Grievance—Procedure	0	0.00	1	100.00	1
090.10000	Holiday Scheduling	7	29.17	17	70.83	24
090.20000	Holiday Pay	11	21.57	40	78.43	51
100.60000	Scheduling General	21	19.09	89	80.91	110
110.00000	Learners General	0	0.00	1	100.00	1
120.00000	Sub General	3	42.86	4	57.14	7
130.00000	Job Descr. & Eval. Gen.	0	0.00	3	100.00	3
140.20000	Apprenticeship Gen.	2	12.50	14	87.50	16
150.00000	Arbitrator's Jurisdictio	0	0.00	0	0.00	0
160.00000	Management Rights	0	0.00	2	100.00	2
160.32000	Job or Task Assignments	19	27.54	50	72.46	69
170.00000	Overtime General	21	13.64	133	86.36	154
180.50000	Jurisdictional Assign.	43	19.91	173	80.09	216
190.00000	Rates of Pay General	3	17.65	14	82.35	17
190.40000	Incentives General	6	12.24	43	87.76	49
200.00000	Reporting Allowance	6	31.58	13	68.42	19
201.00000	Funeral/Witness Pay	2	66.67	1	33.33	3
210.00000	S & H—General	2	18.18	9	81.82	11
210.30000	Safety—Relief From Job	4	28.57	10	71.43	14
220.00000	Sen. General	11	22.92	37	77.08	48
220.21100	Sen. Promotion	8	30.77	18	69.23	26
220.40000	Sen. Interplant Transfer	0	0.00	2	100.00	2
220.60000	Sen. Job Posting	0	0.00	9	100.00	9
220.10000	Sen. Rel Abil—Testing	6	37.50	10	62.50	16
220.10400	Sen. Physical Fitness	3	37.50	5	62.50	8

Cat. Code	Description	Blacks		Whites		Total
		Freq.	Pct.	Freq.	Pct.	Freq.
220.12000	Sen. Temporary Vacancies	5	35.71	9	64.29	14
220.13000	Sen. Union Officials	0	0.00	1	100.00	1
222.00000	Sen. Force Reductions	3	23.08	10	76.92	13
222.60000	Sen. Recall	1	25.00	3	75.00	4
223.00000	Sen. Labor Pool	0	0.00	2	100.00	2
224.00000	Sen. New Facilities	0	0.00	0	0.00	0
240.00000	Strikes/Slowdowns—Gen.	0	0.00	0	0.00	0
260.00000	Termination of Employmen	6	66.67	3	33.33	9
270.00000	Vacations General	5	33.33	10	66.67	15
280.00000	Veterans Rights General	0	0.00	0	0.00	0
290.00000	PIB General	4	16.67	20	83.33	24
999.99999	Unidentified	2	25.00	6	75.00	8
	Total	463	25.67	1341	74.33	1804

LUKENS' EXHIBIT 505

LUKENS STEEL COMPANY

WARNING OR SUSPENSION NOTICE

Date 3-5-75

Check No. 3113

Employee's Name—In full: Paul O. Taylor

Department: Machine & Forge

Cross Out One: Warning

Infraction—Cause for Warning or Suspension: Rule 4 Insubordination

Shift Involved: 2

Has This Infraction Been Discussed With Employee, Cross Out One: Yes. When: 3-3 & 3-5. By Whom: L. Beck, J. Monoghan, L. Hamm, Zone 8 Committee.

GIVE FULL DETAILS OF INFRACTION:

There was an incident involving another employee (Dan London, Ck 6986) on 3-3-75.

There was misconduct in the performance of your job when abusive language was used & when you were reluctant to permit a fellow workman the use of company tooling.

See attached evidence sheets for details.

* * * *

ENDORSEMENT

/s/ J. Monaghan
Foreman
/s/ Larry Hamm
Union Rep.
/s/ J. Newhouse
Superintendent

LUKENS' EXHIBIT 509

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C.I.O., Local #1165

Number L-10426-5

Date: 7-20-78

Rec'd By: T. Scull

Name: Kenneth T. Young Check No.: 6430

Address ———— Job ————

Dept. 120" Mill, Div. Cranes

Employee's Statement of Grievance

I, the undersigned, contend the Company is discriminating against me in overtime because of my race. This occurred the week of July 9, 1978.

I ask the Company to cease and desist and to straighten this situation out immediately.

/s/ Kenneth T. Young, July 17, 1978

First Step, Foreman's Answer:

To 3rd Step

* * * *

3rd Step—L.U. #1165 August 8, 1978

Grievance L-10426-5—Kenneth T. Young #6430, Cranes—Rec. 7-20-78

I, the undersigned, contend the Company is discriminating against me in overtime because of my race. This occurred the week of July 9, 1978.

I asked the company to cease and desist and to straighten this situation out immediately.

UNION POSITION: The Union contended the Company is discriminating against the grievant because of his race in the distribution of overtime opportunity. The Union stated that during the week in question the Riggers were working overtime and Crane Operator Riggins worked two extras and the grievant was not accorded an opportunity to work overtime. The Union also stated that Foreman Reese has been handing out overtime and not contacting the Crane Office. The Union also contended that some overtime is not being recorded by Crane Department supervision.

COMPANY POSITION: The Company stated the grievant has 22 overtime opportunities year to date and is the top man in this respect on both cranes that he operates on a regular basis. The Company stated it has overtime records to substantiate that the grievant is receiving his fair share of overtime opportunity year to date. The Company stated that all overtime distribution should be handled through the Crane supervision and the Company will appraise Foreman Reese of this position. The Company stated that during the week in question, the grievant worked overtime on the Saturday 8-4 turn.

DISPOSITION: As requested, Foreman Reese has been instructed that crane overtime is to be distributed by the Crane Department. Since the grievant is otherwise receiving a fair share of overtime opportunity, the Company considers this grievance settled.

3rd Step—L.U.#1165 October 10, 1978

Grievance L-10426-5—Kenneth T. Young #6430, Cranes—Rec. 7-20- 78

I, the undersigned, contend the Company is discriminating against me in overtime because of my race. This occurred the week of July 9, 1978.

I ask the Company to cease and desist and to straighten this situation out immediately.

UNION POSITION: The Union stated that overtime is not being equally distributed resulting in employee Young not getting a fair share of overtime. The Union stated that employee Rigging is receiving the overtime on the crane he works every day and that the grievant gets other overtime opportunities in other parts of the mill. The Union stated that Foreman Reese is not distributing overtime as agreed.

COMPANY POSITION: The Company stated that overtime opportunity is being equalized and records indicate that employee Young had 21 turns of overtime through July 20, 1978 as compared to 19 turns of overtime for employee Riggins through the same date. The Company stated that Foreman Reese understands that overtime will be distributed by the Crane Office.

DISPOSITION: The Union will make a written reply to the Company within ten days in accordance with the terms of the current Labor Agreement.

Step 4—L.U.#1165 March 28, 1979

Grievance L-10426-5—Kenneth T. Young #6430, Cranes—rec. 7-20-78

I, the undersigned, contend the Company is discriminating against me in overtime because of my race. This occurred the week of July 9, 1978.

I ask the Company to cease and desist and to straighten this situation out immediately.

UNION POSITION: The Union contends that the grievant is not being given equal overtime opportunities. The Union stated that employee Riggins gets all of his overtime opportunities on one crane while employee Young is forced to go all over the mill to get overtime. The Union stated that Foreman Reece had been instructed by Supervisor Taylor that all crane overtime is distributed by the Crane Office and not by Foreman Reece.

COMPANY POSITION: Supervisor Taylor stated he had advised Foreman Reece that all overtime on the cranes had to be distributed through the Crane Department. Supervisor Taylor stated he was not aware that Foreman Reece was handling the crane overtime in the 120″ Mill. The Company stated that Foreman Reece is calling the Crane Office now when overtime is necessary. The Company stated that as of July 15, 1978, both Mr. Young and Mr. Riggins had 19 turns each of overtime. The Company stated they will further check the overtime situation for the week of July 9, 1978.

DISPOSITION: The Company believes the situation to be equitable in regard to overtime. As stated above, Messrs. Young and Riggins both had 19 turns of overtime as of the week ending July 15, 1978. Mr. Young had worked 18 turns and had one reject. Mr. Riggins had worked 16 turns and had three rejects. In view of the foregoing, the Company considers the grievance to be closed and settled to the satisfaction of both parties.

LUKENS STEEL COMPANY

CIVIL RIGHTS COMMITTEE MEETING
September 21, 1979
Employment Conference Room

Representing Company	*Representing Union*
N. J. Thompson	Thomas James
D. R. Copeland	Benjamin Pilotti
	Allen Mowday
	Richard Jacks

Mr. Newton Thompson reported on progress on Grievance L-10426-5 involving a charge of discrimination by Mr. Kenneth T. Young. Mr. Thompson presented statistics on overtime for Mr. Young for the year 1979. Mr. Thompson pointed out that these statistics showed no discrimination. Mr. Thompson further stated that he and Mr. Thomas James had met with Mr. Kenneth Young and discussed this matter with him. Mr. Thompson reported, and Mr. James concurred, that Mr. Young was satisfied with this investigation and found the finding satisfactory. It was agreed that 1979 showed no discrimination and that prior history in this matter was resolved satisfactorily. Mr. James stated that Mr. Thompson had done a fine job in this joint investigation.

Mr. Pilotti stated he had received a verbal complaint from Mr. Sam Clark. The complaint centered around scheduling discrimination. Because of prior complaints by Mr. Clark, it was agreed that Messrs. Thompson and James would investigate this complaint and report during the next Civil Rights Committee Meeting.

/s/ Dennis R. Copeland
D. R. COPELAND,
Asst. Manager
Labor Relations

cc: Allen Mowday
Thomas E. James
Benjamin Pilotti
Carol Shock
Richard Jacks
J. L. Slattery
C. G. Mahairas
N. J. Thompson

4th Step—L.U.#1165 September 26, 1979

Grievance L-10426-5—K. Young, Cranes—Discrimination.

DISPOSITION: The instant grievance has been resolved in accordance with the minutes of the Civil Rights Committee Meeting held on September 21, 1979.

* * * *

LUKENS' NO. 1806

INDUSTRIAL RELATIONS
ANNUAL REPORT
1974

* * * *

Grievance Procedure

One of the primary objectives of the division is to reduce the backlog of grievances to a more reasonable level. The following is a summary of grievance activity over the last five years:

	Submissions	Settlements	Unsettled At Year's End
1970	457	389	439
1971	651	549	529
1972	623	682	454
1973	667	703	408
1974	706	722	383

These figures indicate that the number of grievances filed or submitted is headed in the wrong direction. Again, we managed to keep current for the number settled exceeded the number submitted in 1974. However, the difference this year was only 16 in number and this difference has been decreasing each year for the last two years—in 1973 it was 36 and 1972 it was 59; we find ourselves running very hard to stay a little ahead of even. The number of unsettled grievances at year's end was gratifying—383—the first time in at least five years we have been under 400. A new low for and during the same five-year period was established on October 31—337. This low figure for year end—383—is going to be difficult to retain unless the Union leaders manage to set up some type of grievance screening procedure prior to filing by employees and/or Union representatives.

In reviewing and analyzing the grievances submitted during 1974, it is noted for the first time the number of

grievances filed exceeded all previous records—706. Over 50% of the grievances filed in 1974 were in four categories—crossing seniority lines (138), foremen working (106), discipline (101), and incentives (66). These same four categories have for the last five years and probably more always been on the top of the heap with the lead varying between crossing seniority lines and incentives, followed by foremen working and discipline. These four categories also account for over 50% of the grievances pending at year's end—215 of 383. A review of the activity in the four leading categories is outlined below:

Crossing Seniority Lines

	Filed	Pending
1974	139	54
1973	121	58
1972	142	93
1971	69	75
1970	63	73

The number of grievances filed in the above category in the last three years has doubled those filed in 1971 and 1970. The only explanation for this increase is an increase in the surveillance exercised by certain grievance committeemen—crossing the seniority lines or truly jurisdictional dispute between crafts, crafts vs. production or service units, and between production units and/or service units. From the record, it is noted Ben Pilotti, Chairman of the Grievance Committee and former Committeeman for Zone 9, and Steve Olinick are the watchdogs for possible crafts disputes. They led all committeemen by filing more than 50% of the grievances filed in this category—64 of 120. They were followed by Jim Brown, Committeeman for Zone 7, with 27. Brown files grievances on anyone driving truck other than Transportation Department employees. Albie Welsh

from Zone 2 filed 21 grievances contesting operations being performed by someone other than mill personnel. It is obvious from the record that a good deal of time is spent during the year processing grievances in this category—at least for 1974 and 1973—for the number pending at year's end—54 and 58—only represent 15% of the total number of grievances—383—at year's end. There really is not too much management representatives can do to reduce the number of grievances filed in this category. The Union, through Pilotti and Olinick, are dedicated to keeping the craft job assignments pure—Brown files a grievance any time he sees or someone reports somebody other than a truck driver driving a truck or operating a BG or NG engine if they are not an engineer.

* * * *

APPENDIX F

Grievances

		1973	1974
1.	Submissions		
	Bargaining Unit	85	106
	Incentives	128	79
	Job Des. & Class.	53	47
	Vacations	1	3
	Overtime	35	33
	Holidays		
	Reporting Pay	4	16
	Other Wage	23	25
	Scheduling	38	21
	Assign. Work Forces	31	41
	Cross. Sen. Lines	121	139
	Seniority	49	32
	Discipline	55	103
	Safety & Health	3	15
	Subcontracting	23	27
	Other	18	19
	Total	667	706
2.	Settlements		
	Granted by Company	228	230
	Withdrawn by Union or Compromise	475	492
	Total	703	722
	Grievances Settled at:		
	Steps 1 & 2	223	257
	Steps 3 & 4	480	465
3.	Unsettled at Year's End		
	All Steps	408	383

LUKENS' EXHIBIT 3050

MEETING WITH BY-PRODUCT DELEGATION—
JULY 13, 1978—3:00 P.M.
INDUSTRIAL RELATIONS CONFERENCE ROOM

Representing Company	Representing Union
E. L. Fogleman	Benjamin Pilotti
C. B. Copeland	James Brown
T. J. Ryan	Ray Gardner
P. T. Scull	Robert Cornett
	Donald Smith
	Frederick Hicks
	Edward Mayo
	Waddell Tucker

Mr. Ryan stated that today's meeting was called in response to the petition submitted to him by the Union. Mr. Ryan indicated that the subject matter of the petition has been discussed by top management and Ed Fogleman, Director of Manufacturing, has been assigned the responsibility of representing top management.

Mr. Fogleman stated that the Company is sincerely interested in good employee relations. Mr. Fogleman emphasized that both parties have a mutual interest in Lukens. He stated it is the Company's objective in these discussions to improve communications between the parties and indicated that it will be the Company's role in the initial meetings to listen. He indicated that the Company will respond in subsequent meetings.

1. Unjust suspensions and disciplinary actions taken against the hourly employees.

    a. Suspensions unjust and too severe; specifically referred to the three-day suspensions accorded employees Boggs and Cochran for running crane through a red light. In the Cochran case, neither supervision nor maintenance personnel notified him

that the red light was on. A foreman had also directed Cochran to go through the red light the day before. There was objection to the fact that no action was taken against either the foreman or mechanics who failed to notify Cochran that the red light was on, which is a requirement of Company safety rules with respect to the red light. It was also pointed out that when a Crane Operator is busy, he does not look for a red light unless he is notified.

2. Management's impassive concern for hourly employees and welfare of Lukens.

   a. Approximately two years ago, management removed the drill press from Building #2; now management sends material to the Machine Shop to be drilled, which is inefficient.

   b. Remote cranes have slowed production.

   c. In Building #3, the reduction from four to three cranes has resulted in machines being operated on the 3-11 turn; when there were four cranes, employees only had to work the 7-3 shift.

   d. Supervision recently laid off 23 employees and worked overtime on the press and in the Die Shop; management should operate three turns rather than two turns plus overtime.

   e. Management shortcuts nuclear procedures to meet shipped on time. For example, with respect to Heat Treat Procedure #18 on #100 Furnace, nuclear procedure calls for painting a protective coating on all blanks before heat treating and during heat treatment blanks are supposed to be placed on an 18″ high vented pot. On Order 293761392-1, management instructed employees not to paint the blanks and used 8″ pots. Management instructs employees to change melt and

slab numbers without documentation. Management instructs employees to move fixtures in another direction when grinding defects on heads so no defect is exposed. Management instructs employees to regauge heads which are under-gauge in another area than that which is under-gauge in order to meet shipped on time. With regard to fixture checking heads, if Inspectors won't accept heads, management assigns other Inspectors; customer eventually rejects heads anyway. Management has knowingly shipped Kennedy half-shells which will be rejected. With regard to double hemispheres, size 72⅜ to 79″, management is well aware that there is a defective die, but continue to make defective product and then repair it. The concern expressed with respect to the above practices was with the fact that the Company makes no profit and the customer goes elsewhere.

f. Management constantly, during the turn, changes the work they want performed. Production Control does not know what it is doing.

g. Management ignores the advice of Engineers. For example, there had been a problem breaking heavy gauge heads. Engineers told management to stop stacking; however, management continues to stack and break heads.

3. Management's general lack of concern for working conditions in the shop.

a. It was suggested to management that a blinking light rather than a red light be used to get Crane Operator's attention. The suggestion was rejected.

b. Mayo once told a foreman a red light was not working and the foreman would not listen.

c. Management ignores safety.

d. Stacking pallets too high at the end of the shear; Safety agrees—nothing done.

e. Miller told last week Rockwell piles too high (estimate 7′); indicated he would look into it—nothing done.

f. Management assigns employees who have no training to operate tow motor; issue temporary license with no training. For example, Jim McElhone.

g. OSHA told management to put a gauge on the brake. Management refused and was later forced to put on a gauge.

h. Remote control cranes are unsafe and can run away. For example, a remote control crane ran into a trailer and has damaged the walls by the furnace under such circumstances.

i. It has been suggested to management that they train men on #20 Brake since all present operators are highly inexperienced. Management refuses.

j. Floor fans are missing in the By-Products grinding area. Management has made no attempt to secure a fan. Vertical Blast Grinders have a floor fan for use during hot weather.

4. Management's continuous efforts to create social and racial differences among the hourly employees.

a. A bargaining unit employee in Building #3 made the statement that only blacks leave work early to shower. Blacks told Miller about this in order to avoid a problem—Miller said he could not do anything about this. Miller also told the blacks that if they did anything about it, they would get

in trouble. Only wanted Miller to talk to the employee involved in order to avoid a potential problem. No respect for the Shears group.

b. Miller told men with respect to their job class that they were only pushing steel and did not need any ability to perform their job.

5. A general lack of respect for our contract by management.

a. Jobs are posted, but bidders are not trained. This occurs while employees are on layoff and management works overtime; however, under the same conditions, management is training a temporary foreman.

b. Jobs are posted and supervision selects other than the senior bidder. This has occurred on #330 Press, #108 Press, #302 Rolls and #18 Flattener. Employees Sherman Walker, Elsie Reese, Terry Lavender and Jerry Swinehart were cited as employees who were denied the jobs they bid. The bidders were subsequently placed on the jobs they had bid, but only after protest and discussion.

c. Two older employees who have bid the Welder's job have been denied that job while a younger employee, Ruczhak, has been assigned the job. Now that Ruczhak would be on layoff, he has been made a temporary foreman.

d. Supervision constantly fails to recognize seniority with respect to daily job assignments. Employees have to argue or protest before such assignments are reversed.

e. Company agreed in negotiations to install a barrier by #321 Furnace—nothing has ever been done.

6. Management's failure to comply with pollution equipment provided for in our contract.
   a. Management pumps oil from one pit to another and then into the creek; there is a tank which is supposed to be used to take the oil away; they fill the tank, then accidently dump it.
   b. One of the roof fans in the Building #2 gas cutting area does not work—nothing done.
   c. During the winter when employees burn wood to keep warm, smoke is a problem due to the lack of ventilation.
7. Of utmost importance is management's policy, particularly regarding department superintendent Sam Miller.
   a. Miller does not want to communicate with the men.
   b. Miller makes decisions and does not care whether they are right or wrong.
   c. Management in general has had a negative attitude in By-Products for the last four years.
   d. Foremen tell men that Miller does not listen to them either.
   e. Miller's attitude is the #1 problem in Pressed and Formed Products.
   f. Men (in Shears) want Miller to respect them on the job as human beings.
   g. Miller does things behind their back in order to start trouble. For example, two years ago, Miller told the men to take delay with the remote control crane. Delay is now being cut out by Industrial Engineering. Can't trust Miller.
   h. Last week, Mayo was wiping his glasses when Miller asked him about an order. Miller then

told him that he had his glasses off, and when he pointed out to Miller that he was wiping them, Miller just walked away.

At the conclusion of the meeting, it was agreed that a subsequent meeting would be held next week. Date, time and specific agenda to be determined.

/s/ P. T. Scull
P. T. Scull, Assistant Manager
Labor Relations

LUKENS' EXHIBIT 3050A

MEETING WITH BY-PRODUCTS DELEGATION
July 27, 1978—3:00 p.m.
Industrial Relations Conference Room

Representing Company	*Representing Union*
E. L. Fogleman	Benjamin Pilotti
G. B. Copeland	James Brown
T. J. Ryan	Ray Gardner
P. T. Scull	Donald Smith
S. L. Miller	Fred Hicks
	Edward Mayo
	Paul Gregor

Mr. Fogleman stated that the Company has spent considerable time investigating comments made by the By-Products Delegation at the previous meeting. Mr. Fogleman stated the Company is prepared to respond to the petition and elaborating comments made at the previous meeting. Mr. Fogleman stated the Company has taken seriously both the petition and the comments from the previous meeting since both parties have a mutual interest in Lukens well-being. Mr. Fogleman requested that the Union play the role that was adopted by the Company in the previous meeting which, in this instance, would be to listen to the Company's responses.

Mr. Copeland stated that he has been designated as the Company's spokesman to cover the first six items of the petition and Mr. Miller will speak concerning the seventh item on the petition since Item #7 refers specifically to Mr. Miller.

1. Unjust suspensions and disciplinary actions taken against hourly employees.

   Mr. Copeland stated that we all recognize that disciplinary action, including suspension or dismissal, would not be necessary if every employee fulfilled

his responsibilities and obligations 100% of the time. Unfortunately, this does not happen and the only recourse available is to use disciplinary action as set forth in the joint contract based on the severity of the incident. Mr. Copeland emphasized, however, that we firmly believe that discipline should and will be used only where absolutely necessary.

With regard to the specific examples concerning cranes which ran through a red light, Mr. Copeland stated that the Company has no objection to the use of a flashing red light as suggested by the delegation. Mr. Copeland pointed out, however, that a flashing red light was previously used in the Electric Melt Shop and caused more irritation and distraction than help, but stated the Company is willing to use it on an experimental basis at By-Products. Mr. Copeland stated the Company also believes it will be necessary to change the location of lights to help the remote crane operators to see them.

2. Management's impassive concern for hourly employees and welfare of Lukens.

Mr. Copeland stated that at the previous meeting an example was cited concerning the removal of the drill press from Building #2 stating that the material is now sent to the Machine Shop, which is inefficient. Mr. Copeland stated that Company records indicate that this piece of equipment was removed from the shop in mid-1975, some three years ago. Prior to its removal, during that year, it has been utilized less than one hour per week. In 1974 and 1973, this piece of equipment had been used for less than 4.5 hours per week. In other words, there was insufficient work to efficiently operate keeping one employee on the payroll. Mr. Copeland stated it was, therefore, determined that the space could be used providing additional jobs for more people while having the drill work done at the Centralized Machine Shop.

Mr. Copeland stated that another comment made at the previous meeting concerned reduction in efficiency in Building #3 because of remote control cranes and the elimination of a crane from that building. Mr. Copeland stated that the Company was quite pleased to hear in the previous presentation the general concern by the delegation with respect to efficiency, productivity, profitability and good-quality workmanship. Mr. Copeland stated that pressed and formed head business is extremely competitive and the Company sees no significant improvement in the near future. Mr. Copeland stated that both parties must recognize that constant improvement in equipment and practices for the purposes of reducing costs and maintaining jobs is vital. Our decision to remote control our cranes was a step in this direction. Mr. Copeland stated it is also important that our equipment be used around the clock since we cannot afford to have unused equipment laying idle 16 hours per day.

Mr. Fogleman stated that the Company would like to see business reach the point where there would be delay and congestion and employees would be scheduled three turns. Mr. Fogleman stated that if the business activity reaches such a level, the Company would consider putting in a fourth crane in Building #3 under such conditions.

Mr. Copeland stated that another point stressed at the previous meeting was the fact that the Company laid off 23 employees the previous week and then had to work overtime. The overtime would not have been necessary had we not had excessive delays due to die equipment failure on Rockwell blanking. Mr. Copeland stated that unfortunately this occurred and necessitated overtime in order to satisfy customer requirements. Mr. Copeland emphasized that the shop was properly scheduled for the workload during the week in question and the Company could not antici-

pate the delays that occurred due to die equipment failure on Rockwell blanking.

Mr. Copeland stated that at the previous meeting the delegation pointed out that nuclear procedures were not followed and the Company was shipping defective material to customers knowingly, which creates dissatisfied customers. Mr. Copeland assured the delegation that it is the Company's policy that no nuclear shortcuts will be taken; however, we all recognize that mismarking and mis-stamping can occur and the restamping or remarking is only done under the full knowledge of the Inspection Department, who is responsible for seeing that our nuclear procedures are followed. As you are probably aware, Bill Jones had a shipment unloaded from a truck at the end of the last period because one of the heads was not stamped properly. We missed our goal for the period as a result, but did correct the situation and thus improve customer satisfaction.

Mr. Fogleman emphasized again that it is the Company's policy to follow the nuclear code and that no nuclear shortcuts will be taken. Mr. Fogleman stated that the nuclear code recognizes that mistakes will be made such as mismarking and mis-stamping and provides a procedure which must be documented by Inspection to correct such errors. Mr. Fogleman stated that he well remembers the shipment that was unloaded at the end of the last period because one of the heads was not stamped properly since it resulted in By-Products missing their goal for shipped on time. Mr. Fogleman stated that the bargaining unit employee who stamped the head mistook a D for a B on the order and, therefore, mis-stamped the head. Mr. Fogleman stated that Bill Jones did the right thing by unloading the shipment until the head could be properly reidentified despite the fact that shipped on time suffered as a result.

Mr. Copeland stated with regard to rippled hemispheres that when we received a complaint from Charlotte Tank Company, we immediately made a formal investigation. That investigation disclosed that excessive rippling was being caused by defective die parts. These parts have been ordered and they will be delivered shortly. In the meantime, we are filling orders using the best die equipment available, fully recognizing that some rework is necessary. Mr. Copeland emphasized that it is the only course of action open to us if we are to continue to produce the product for the customer and provide jobs for hourly employees involved. Mr. Copeland stated that if the Company were not to continue to produce the order, the customer could go to another supplier for the order and then the Company would have to contend with another supplier for future orders.

Mr. Copeland stated that another example cited at the previous meeting had to do with the breaking of heavy gauge heads. When this occurred in late 1977, an exhaustive Metallurgical investigation began and was conducted during the 1st Quarter of 1978. Several changes were made as a result of this investigation and have been adopted as standard procedure. The surfaces being ground on the Ty-Sa-Man machine remove any decarbonization and this has been a major reason for the reduction in breakage. The heating procedures and times have been changed to minimize decarbonization and copper checking. Eighteen inch vented pots were suggested, but not mandatory, as an aid to improving circulation in the furnace. Die clearance also was determined to be partially responsible. This is being corrected by the Engineering Department. Likewise, taper machine blanks on some gauges have contributed to improvment. This is all documented in a report written by D. Bracher and M. Townsley on May 15 and has

become standard practice. Mr. Copeland stated he hopes the delegation can appreciate the complexity of the situation, the depth of the investigation and the fact that management is not insensitive or ignoring the problem that will create dissatisfaction on the part of our customers. Mr. Copeland noted that while 18″ vented pots are not available, smaller pots are to be used.

3. Management's general lack of concern for working conditions in the shop.

Mr. Copeland stated that a great deal of comment was made concerning the stacking of Rockwell and pallet material. Mr. Copeland stated that the Company has no objection to reducing the height of the stacks as long as there is additional shop space. Obviously, the piling of stacks is done by bargainig unit employees, not supervision, so the Company assumes this will be easy to control.

Mr. Copeland stated that an example was cited concerning a tow motor driver who had not been properly trained and authorized to use the tow motor. The Company's investigation indicates that this delegation was quite right in bringing it to our attention. A training procedure has been formally written and only those who qualify will be permitted to use this piece of equipment in the future.

Mr. Copeland stated the delegation expressed concern about overloading #20 Brake. As you know, this piece of equipment has been in operation for more than 30 years. Through these many years, a size card for acceptances within the brake's limitations was developed and has been used for order acceptances. However, because of the concern expressed earlier this year, Sam Miller wrote a requisition on April 14 to purchase load cells for this unit as well as for #106 and #108 Presses. The equipment was re-

ceived the week of June 26 and installed immediately. Since that time, three tests have been made, using a variety of gauges and material. None of the loads came anywhere near the brake's limitation. In fact, the maximum load registered was 500 tons on this 1,000 ton unit, which has a peak load capacity of 1,500 tons. It wouldl appear to the Company that our old size card for acceptance is probably conservative. However, we expect to continue experimenting on different gauges and types of material for a few more weeks until we can develop a comprehensive new size card for order acceptances which will be based on the actual loads experienced. Mr. Copeland also added that the load cell gauges cannot be left on the equipment since they are very sensitive and the manufacturer tells us vibration from repeated operations day in and day out result in unreliable readings; therefore, the testing will have to be done on a specific plan basis. As you can see, for the best part of six months we have been responding to this problem in a logical, factual, planned approach in order to maximize the amount of work and number of hours which can be obtained.

Mr. Gardner objected to the fact that the load cells are only being calibrated at one range at the bottom of the scale. Mr. Gardner expressed concern that the load cells are not being calibrated at a maximum range.

Mr. Fogleman stated he will personally respond with regard to Mr. Gardner's concern regarding the range of calibration.

4. Management's continuous efforts to create social and racial differences among the hourly employees.

Mr. Copeland stated that he personally wants to reassure the delegation that every employee has a job to do and we do not care whether that employee is

black, white, yellow or red, nor do we care whether that employee is female or male. We will do our best to treat everyone fairly and honestly. Mr. Copeland stated, however, that we should all recognize that we cannot control what every individual says. Many times comments can be made which are misinterpreted. Mr. Copeland stated that he assures the delegation that we will not tolerate any racial comments and will be happy to discuss the matter with any specific individual identified as making comments to create social or racial unrest.

Mr. Copeland stated with respect to the job class of the Shear crew that specific numbers of the Shear crew, and particularly Alfred Hicks, had discussed this with him many times. Mr. Copeland stated he has fully investigated the matter on several occasions and has told the Shear crew members and Alfred Hicks that in his opinion the job classification of the crew members has been fairly evaluated. The grades of the Shear are consistent with the other job classifications doing similar work in other areas of the Company.

Items #5 and #6

Mr. Copeland stated the barrier by #321 Furnace will be installed. It is an expense which probably should not be necessary, but since it will provide the extra protection requested and was agreed upon in negotiations, the Company will comply.

Mr. Copeland noted that roof and floor ventilation was expressed as a matter of concern. Two portable fans were missing from the shop for repair, both have been returned, and are in operation currently. The Company is investigating what is necessary to bring the defective roof fans into satisfactory operating condition. A plan will be developed and implemented over the next several months; however, addi-

tional roof ventilation over the gas cutting areas is not justified based on the air quality standards as measured by Martin Godra.

Mr. Fogleman stated that at the current level of activity there is no need for additional ventilation in the gas cutting area. Mr. Fogleman stated this is not a closed subject if the gas cutting level of activity substantially increases resulting in air quality standards which are in violation of OSHA standards. Mr. Fogleman emphasized that currently the air quality standards are not violating OSHA standards.

Mr. Copeland stated that oil spillation in #3 Press Shop was a matter of grave concern as expressed at the previous meeting. A plan was developed last year and the board approved a capital appropriation to install a complete recirculating system located west of Plant 3 which h .s been finished and is just beginning to function. We see no further difficulty on this specific subject for the future.

Mr. Fogleman emphasized that a significant capital appropriation has resolved this problem and he considers this question a closed book.

Mr. Copeland stated there was also a comment about wood smoke during the winter at the previous meeting. The obvious solution is to return to the use of gas. Unfortunately, this is not possible due to the gas shortage that continues to exist in the United States. We do know that the burning of wood causes a great deal more smoke than the burning of coal and wish that employees would use the coal provided to minimize this problem as much as possible in the future.

Mr. Gardner pointed out that in Canada buildings are heated since it is required by law. Mr. Gardner suggested that perhaps electric heat would be an alternative to gas at Lukens.

Mr. Fogleman stated that there is not a gas and oil shortage in Canada as there is in the United States. Mr. Fogleman stated it would be impossible for Lukens to heat buildings with gas due to the unavailability of gas. Mr. Fogleman stated the Company is investigating the possibility of using a by-product of furnace heat in the future to heat buildings. Mr. Fogleman stated that while he is is sympathetic to cold conditions which exist in the winter, it is no more practical to attempt to heat buildings at Lukens than it is to heat a barn. Mr. Fogleman stated the Company will attempt to make sure that good coal is available of heating purposes during the winter.

Mr. Copeland stated that on the subject of shop postings, training, and job assignments, the subject is very complex. The Company understands the delegation's concern and will do everything it can to provide maximum job opportunities through contractual posting and training and suggests that due to the complexity of this subject it be further discussed at the shop level between members of the delegation, Ray Gardner and Sam Miller.

Mr. Fogleman stated that while he concurs with what Mr. Copeland has said with regard to job posting and training, he requested that the delegation consider giving supervision at the shop level some relief on situations where employees are perpetually training for different jobs in By-Products.

Mr. Copeland stated that Sam Miller will personally discuss Item #7 which deals with his personal management and supervisory style.

Mr. Miller stated that while he was not able to be present at the previous meeting due to the fact he was on vacation, it is his understanding from the petition and comments recorded from the previous meeting that the major objection to his supervisory

style is his faiure to communicate with the men. Mr. Miller addressed each member of the delegation personally, recalling incidents when he had personally discussed problems with each member of the delegation. Mr. Miller stated he has always been willing to discuss problems with any member of By-Products except in those instances when he has had a previously scheduled meeting. Mr. Miller assured the delegation that in the future he will be available to discuss problems with any employee in By-Products.

Mr. Fred Hicks stated that Mr. Miller has done nothing in response to the request of members of the Shears that the Shears job be raised in job class.

Mr. Miller responded that he has discussed the job evaluation of the Shears job with Mr. Copeland and Mr. Ryan, who have assured him that the Shears job is properly evaluated. Mr. Miller stated he does not have the authority as a Superintendent to unilaterally raise job rates.

Mr. Copeland stated he has also reviewed the job rates on the Shears and is convinced that they are properly in line with other shear jobs at Lukens and in the industry.

Mr. Ryan stated that the Shears jobs have been reviewed by the International Representative, Mr. Lunney, and are agreed upon by the parties as properly evaluated in accordance with the principles and procedures of the Job Description and Classification Manual which is part of the Labor Agreement.

Mr. Pilotti acknowledged that the Shears jobs are properly evaluated in accordance with the principles and procedures of the Job Description and Classification Manual which has been agreed to by the parties. Mr. Pilotti requested that management take another look at the rates on the Shears jobs, pointing

out that there are other jobs in Lukens for which special rates have been negotiated by the parties.

Mr. Ryan pointed out that there are only a handful of jobs for which there are negotiated rates and these rates came out of Company-Union negotiations. Mr. Ryan stated, however, the Company will take another look at the Shears jobs as requested by the Union.

Mr. Gardner asked the Company what it planned to do about job assignments which supervision fails to follow the agreed-upon procedure in filling. Mr. Gardner referred to an incident that occurred following the last meeting of the parties in which Mr. Gardner contended supervision failed to follow the procedure for reassignment and overtime. Mr. Gardner stated that overtime continues to be a problem also since foremen refuse to record overtime opportunities extended to employees who refuse overtime.

Mr. Miller stated he has discussed this subject with Mr. Gardner and instructed foremen to record all overtime opportunities.

Mr. Gardner acknowledged that he had discussed this question with Mr. Miller and that Mr. Miller has instructed his foremen to record all overtime opportunities, but foremen continue to refuse to follow Mr. Miller's instructions. Mr. Gardner stated that perhaps foremen should be disciplined in the same manner as the bargaining unit employees for failing to do as directed.

Mr. Fogleman stated the Company has its own way of disciplining non-bargaining unit employees. Mr. Foglemen suggested that the questions being raised by Mr. Gardner be pursued in subsequent meetings held at the shop level due to complexity and detail involved. Mr. Fogleman stated with regard to the sales outlook at By-Products that the Company is doing everything in its power to get more work for By-

Products. Mr. Fogleman stated that both parties can assist this effort by making By-Products as cost competitive in the marketplace as possible.

Mr. Copeland stated that the Company has tried to respond favorably and with facts to the concerns expressed by the delegation. Mr. Copeland stated he hopes the parties fully understand that market and competitive conditions are causing drastic changes in pressed and formed product mix and volume. Mr. Copeland stated the only way we can provide the maximum number of jobs is to continue to improve efficiency, utilize the equipment and space available in the most productive way, and be both ready and willing to cooperate in accepting the changes that are necessary.

At the conclusion of the meeting, it was agreed that subsequent meetings would be held at the shop level; date, time and specific agenda to be determined.

/s/ P. T. Scull
P. T. SCULL
Assistant Manager
Labor Relations

LUKENS' EXHIBIT 3051

January 2, 1979

Mr. E. L. Fogleman
Director of Manufacturing

Implementation of Union Requests

Dear Sir:

All of the Union requests directed at Pressed and Formed Products have been completed.

The last one to be corrected was the installation of a penetration barrier along the north wall of Plant #1, adjacent to the rear of #321 furnace.

This letter will be my final report on this subject.

Very truly yours,

/s/ S. L. Miller
S. L. MILLER
Superintendent
Pressed & Formed Products

cc: G. B. Copeland
T. J. Ryan

November 28, 1978

Mr. E. L. Fogleman
Director of Manufacturing

Implementation of Union Requests

Dear Sir:

The status of the remaining Union requests directed at Pressed and Formed Products department is as follows:

1. Recalibration of #20 press brake load sensor with a capacity load of 1,000 tons.

   The rented hydraulic jacks were repaired by L. J. Stevens Company and returned to Lukens for the third attempt on this date. The brake was put under a load of 1,000 tons and the calibration was correct as stated by L. J. Stevens Company when the load sensors were first installed. The Stevens representative will send me a letter confirming the test results.

2. Install a penetration barrier on the north wall of Plate Processing per contract agreement.

   This project was redesigned by Leo Daiuta. However, no progress has been made toward actual implementation.

Very truly yours,

/s/ S. L. Miller
S. L. MILLER
Superintendent
Pressed & Formed Products

cc: G. B. Copeland
T. J. Ryan
File for F.U.

November 8, 1978

Mr. E. L. Fogleman
Director of Manufacturing

Schedule for Implementation of Union Requests

Dear Sir:

There are two items remaining on the list of Union requests directed at Pressed and Formed Products.

1. Recalibate #20 press brake load sensor with a 1000 ton load.

   The rented hydraulic jacks were received and were tried on October 16th. However, the tests were a failure because the seal in one of the jacks failed. L. J. Stevens Company will return on November 8th, to finish this job.

2. Install a penetration barrier on the north wall of Plate Processing per contract agreement.

   This project has been redesigned. However, no progress has been made as of this time.

Very truly yours,

/s/ S. L. Miller
S. L. MILLER
Superintendent
Pressed & Formed Products

cc: G. B. Copeland
T. J. Ryan
File for F.U.

October 12, 1978

Mr. E. L. Fogleman
Director of Manufacturing

Schedule for Implementation of Union Requests

Dear Sir:

Following is an update of progress in correcting various Union complaints.

1. Install flashing red lights of #108.

   Service request #705, issued August 7th—necessary parts have arrived and Don Armstrong will install by November 1st.

2. Recalibrate #20 brake with an 800 ton load.

   Two 400 ton jacks have been shipped from Niagara Machine. Tests will be made as soon as they arrive. The completion date is rescheduled from October 1st to November 1st.

3. Install a penetration barrier on the north wall of Plate Processing per contract agreement.

   This project has been redesigned. Present siding will be removed and safety guards installed over wiring and piping per Leo Daiuta.

Very truly yours,

/s/ S. L. Miller
S. L. MILLER
Superintendent
Pressed & Formed Products

cc: G. B. Copeland
T. J. Ryan
File for F.U.

September 20, 1978

Mr. S. L. Miller

Dear Sam:

Please continue to provide an up-date monthly on the progress of all items on which we agreed to take action during our recent discussions with the Union.

Also, include in that monthly progress report the number of meetings held with Shop Union representatives to communicate or inform them on the various subjects. I would like to see you have Dave Jordan maintain for the next year a log showing the number of specific meetings or contacts held with the Shop Union representatives, the specific subjects discussed and the time involved. It would not be necessary to summarize this log but could be very useful should further discussion develop in the next year.

If you have any questions, please review with me. Thank you for your cooperation.

Yours very truly,

/s/ George
GEORGE B. COPELAND

GBC/fms

September 6, 1978

Mr. E. L. Fogleman
Director of Manufacturing

Schedule for Implementation of Union Requests

Dear Sir:

Following is an update of the progress of various items listed in my letter of August 10, 1978.

1. Install flashing red lights to replace caution lights on machinery.

   Service Request #705, issued August 7, 1978. Estimated completion date was September 1st, but the necessary parts have not arrived. This light will be installed on #108 only on a test basis.

2. Establish walkways for the use of radio controlled crane operators.

   All walkways have been identified and lines painted. However, it requires constant attention to keep them open and the lines well painted.

3. Limit height of piles.

   This is not necessary. However, all personnel will be cautioned to be aware of unstable or unsafe piles.

4. Recalibrate #20 brake with an 800 ton load.

   The two 400 ton jacks required for the tests have been ordered from Niagara Machine on a rental basis. As soon as they arrive, J. Stevens Press Service Company, Lester, Pa., will perform the tests. This item should be completed by October 1st.

5. Finish testing and evaluation of #20 brake.

   Leo Daiuta is writing a report which should be out by September 11th.

6. Repair all inoperative roof fans.

   All roof fans were in operation as of September 4th.

August 10, 1978

Mr. E. L. Fogleman
Director of Manufacturing

Schedule for Implementation of Union Requests

Dear Sir:

Following is the current status and estimated completion dates of the various items requested by the local union members.

1. Install flashing red lights to replace present caution lights on machinery.

   Service Request #705, issued August 7, 1978. Estimated completion date, September 1. This light will be installed on #108 only on a test basis.

2. Establish walkways for the use of radio controlled crane operators.

   Painting of yellow lines defining walkways now in process and will be complete by September 1.

3. Limit height of piles.

   This is not necessary. However, all personnel will be cautioned to be aware of unstable or unsafe piles.

4. Recalibrate #20 brake with an 800 ton load.

   L. J. Stevens Press Service Company is scheduled for August 15th to do this work.

5. Finish testing and evaluation of #20 brake.

   Leo Diauta is working on this project and will have a report by September 1.

6. Repair all inoperative roof fans.

   Work will begin August 12 and will be completed by October 1.

7. Install a penetration barrier on the north wall of plate processing per contract agreement.

   A service request has been issued and the project is before A. Eastburn for approval per J. Muhs August 8. There is no estimated completion date at this time.

Yours truly,

/s/ S. L. Miller
S. L. MILLER
Superintendent
Pressed & Formed Products

cc: G. B. Copeland
T. J. Ryan

LUKENS' EXHIBIT 3052

December 4, 1978

Mr. E. L. Fogleman
Director—Manufacturing

P&FP—IMPLEMENTATION OF UNION REQUESTS

After looking at Miller's memo of November 28 on the above subject, it would appear only two items remain to be accomplished—one (1) Miller's responsibility—installation of penetration barrier on north wall of Plate Processing and two (2) Ryan's—a further explanation to the men on the Shears why their rates cannot be increased.

Taking the second item first—I had tried more than several times to arrange a meeting with the Shear personnel through Jim Brown to no avail—Brown finally told me to 'let sleeping dogs lie'. The Union plans to turn the problem over to Frank Lunney, the Union's expert on job classification and rates of pay.

First item—can't you use your influence to help Miller get this penetration barrier started—it has been four (4) months since Copeland made a commitment in the meeting with the delegation from P&FP. Furthermore, there was also a commitment made in the 1977 Negotiations.

/s/ T. J. Ryan
T. J. RYAN
Manager—Labor Relations

cc: G. B. Copeland
S. L. Miller

UNION'S EXHIBIT 57

LUKENS STEEL COMPANY
UNITED STEELWORKERS OF AMERICA
C.I.O., LOCAL #1165

Number L-10932-9

Date 2-23-79

Rec'd By W. Whiteman

Name Paul E. Butcher Check No. 6224

Job——————— Dept. Mechanical Div. Weld Shop

Employee's Statement of Grievance

I, the undersigned, contend the Company is discriminating against me when they denied me the opportunity to work a rotating schedule 4-12 and 12-8 turns as a Gangleader.

I ask the Company to cease and desist immediately.

/s/ Paul E. Butcher
Date Feb. 22, 1979

First Step, Foreman's Answer: 4th Step

* * * *

Step 4—L.U. #1165 April 24, 1979

Grievance L-10932—Paul E. Butcher #6224, Misc. Weld Shop—rec. 2-23-79

I, the undersigned, contend the Company is discriminating against me when they denied me the oppor-

tunity to work a rotating schedule 4-12 and 12-8 turns as a Gangleader.

I ask the Company to cease and desist immediately.

UNION POSITION: The Union contends that Paul E. Butcher was a successful bidder for a Gangleader job. The Union stated the posting did not specify a 12-8 turn over the other two turns.

COMPANY POSITION: The Company stated the grievant will be rotated as a Gangleader on the 4-12 and 12-8 turns.

DISPOSITION: Settled based on the Company's position.

UNION'S EXHIBIT 91

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C.I.O., Local # 1165

Number L8937-6

Date 8-6-76

Rec'd By A. K. Hopton

Name William R. Mayo Check No. 72

Address———————————————

Job ———————— Dept. Melting Div. CF Floor

Employee's Statement of Grievance

I, the undersigned, contend the Company gave me an unjust written warning July 29, 1976.

I ask the Company to cease and desist and to strike this mark from my record.

I feel as though this was a personal reaction from Safety Man Livingston because I questioned him.

Signed———————— Date————————

First Step, Foreman's Answer: Refer to 2nd Step

Second Step Date rec'd by Sup't of Dept 8-6-76

The fact that the area safety man reported Mayo for failure to wear proper safety equipment was not for personal reasons. He was performing his duties as required. The policy of the Melting Department clearly

states that proper safety equipment be worn as required and Mayo did not adhere to this.

Settled No Appealed to Next Step ✔

Signed Richard Jacks A. K. Hopton 8-6-76

3rd Step— L.U. #1165 December 7, 1976

Grievance L-8937-6—William Mayo #72, EMS Floor—Rec. 8-5-76

'I, the undersigned, contend the Company gave me an unjust written warning July 29, 1976.'

'I ask the Company to cease and desist and to strike this mark from my record.'

'I feel as though this was a personal reaction from Safety Man Livingston because I questioned him.'

UNION POSITION: The Union contended the Company accorded William Mayo, ck #72, an unjust written warning on July 29, 1976. The Union stated they would like Mr. Mayo and Mr. Livingston present at the 4th Step.

COMPANY POSITION: The Company stated that every employee is required to wear the proper protective equipment in their work area. The Company stated Mr. Mayo was disciplined for failure to wear safety glasses, failure to wear his hard hat and did not have on his fire retardant shirt.

DISPOSITION: Appealed to 4th Step.

* * * *

L8937-6—Withdrawn by union.

* * * *

UNION'S EXHIBIT 135

JOINT REPORT

December 8, 1964

REPORT OF THE CONTRACT REVIEW COMMITTEE TO THE HUMAN RELATIONS COMMITTEE

I. *TRAINING*

During the past year, the Training Subcommittee of the Human Relations Commitee has been engaged in various fact-finding endeavors. The Subcommitee has attempted to assemble as much information as possible with regard to the training, educational and counseling needs of workers in the steel industry.

A comprehensive statistical study was made of the employees in the operations of the eleven companies in Youngstown, Ohio. The six plants involved were the Brier Hill Works, the Campbell Works and the Metal Products operation of Youngstown Sheet and Tube, the Ohio Works and the McDonald Works of U. S. Steel, and the Republic Steel plant. From the records of over 20,000 employees which were examined, extensive information was obtained regarding advancement opportunities as related to educational attainment, particular types of operations and racial and ethnic backgrounds.

In addition, the Subcommittee conducted meetings with local union and local management representatives from various basic steel plants. The locations included were the Sparrow Point plant of Bethlehem, the Warren, Ohio plant of Republic, the Indiana Harbor plant of Inland, the Fairfield Steel operations of U. S. Steel and the Aliquippa Works of Jones & Laughlin. From the informal discussion at these meetings, the members of the Subcommittee were able to obtain much useful information with regard to training and educational needs of steelworkers.

On the basis of the information received, the Committee members hereby set forth their appraisal of the training problems disclosed, and the general approaches which should be taken in order to deal with those problems effectively.

* * * *

Testing

A. *Union Committee Members' Position*

There is increasing concern in the Union over the use of tests by the industry. Written intelligence and achievement tests are being relied upon for more and more purposes by the companies, but in the Union's opinion, such reliance has been excessive in most instances. When tests are not related to the needs of the industry, when there is no appropriate validation, when the administration of testing procedure is haphazard, and when arbitrary cutting scores are established the value becomes very doubtful. This misuse of and faulty reliance upon testing, which is all too common in the industry, produces only injustices to employees and limits their rightful opportunities for advancement. Therefore, written intelligence and achievement tests should be used only by agreement with the Union and, even then, only after proper validation and appropriate administrative procedures are established.

B. *Company Committee Members' Position*

The Companies have the responsibility for determining the qualifications of employees and the means by which they make such determinations are already subject to the grievance procedure. There has not been any showing that the tests given are not related to the qualifications of the job in question.

* * * *

UNIONS' EXHIBIT 138

United Steelworkers of America, AFL-CIO

1968 Blue Book

Covering Master Agreement and Settlement

Between

UNITED STATES STEEL CORPORATION

and the

UNITED STEELWORKERS OF AMERICA

Production and Maintenance Employees

Heavy Products Operations

Sheet & Tin Operations

Tubular Operations

Wire Operations

August 1, 1968

Pittsburgh, Pennsylvania

* * * *

APPENDIX F

TESTING

The September 1, 1965 Agreement provided the following:

> "The Companies and the Union have not agreed on the subject of testing and, accordingly, have agreed to study the present practices and procedures with respect to the Companies' use of written tests as an aid in determining the ability and qualifications of employees for advancement and transfer. Such study shall be completed not any later than June 1, 1966.
>
> "The study shall include:
>
> (1) A survey of written tests used by the Companies as an aid in the selection of employees for promotion, for transfer, and for entrance into training programs (other then apprenticeship programs);
>
> (2) An examination of the relationship of tests to the qualifications required for the work in question; and
>
> (3) A survey of administrative procedures used in conjunction with testing programs."

The study conducted in accordance with the above revealed differences in the extent to which tests are used and in testing practices in the Industry. Where testing is used, the types of tests and testing procedures vary greatly. In addition, the use of tests was found directed to promotions within promotional sequences, between such sequences for transfer applicants, and for those seeking entrance into training and apprenticeship programs.

The parties, after giving due consideration to the study results, have arrived at the following understandings to be effective August 1, 1969:

1. While the Union preserves fully its right to challenge through the grievance procedure the present or future use of tests, the Union and the Companies agree that where tests are used by the Company as an aid in making determinations of the qualifications of an employee, such a test (except as otherwise provided herein) must in any event be a job-related test. A job-related test, either written or in the form of an actual work demonstration, is one which measures whether an employee can satisfactorily meet the specific requirements of that job including the ability to absorb any training which may necessarily be provided for that job.

2. In the case of manning new facilities, transfers from one agreed-upon seniority area to another and transfer from one plant to another, the parties have agreed in specific provisions of the seniority section of the Basic Agreement that an employee may be required to have the ability to progress. To the extent that such a requirement is applicable, the parties agree that an employee may be tested as an aid in determining whether he can qualify for the job he is seeking and, in addition, is likely to become qualified to perform the next higher job in the line of progression or promotional sequence. Such testing shall be job-related as described above and specifically directed toward measuring the actual knowledge or ability that is a pre-requisite to becoming satisfactorily qualified on the next higher job in the line of progression or promotional sequence.

This provision is subject to the provisions in Sections 13M, 13N and 13-O-2 of the U. S. Steel Agreement (and the comparable provisions in the other agreements).

3. The criteria for entrance into apprenticeship are not affected by this understanding but are covered in Appendix G dealing with that program.

4. The provisions of this Appendix F do not apply to any aspect of testing for entrance into trade and craft jobs and upgrading of trade and craft employees.

5. As to all testing, the following additional guides shall apply:

(a) Tests shall be fair in their makeup and in their administration;

(b) Tests shall be free of cultural, racial or ethnic bias; and,

(c) Testing procedure shall include procedures for notifying an employee of his deficiencies and offering counselling as to how he may overcome them.

APPENDIX G

APPRENTICESHIP TRAINING MEMORANDUM OF UNDERSTANDING

1. *Objective of Apprenticeship Training*

The objective of apprenticeship training is

(a) To provide a full and fair opportunity for achievement of full craft status to interested and qualified employees of the Company, and

(b) To provide the Company with qualified craft personnel.

2. *Crafts—Training Periods—Job Classes*

The crafts involved, the training periods and the job classes therefor are set forth in the Basic Labor Agreement. The Company may provide methods for advancement to craft status other than through the apprenticeship program.

3. *Posting and Filling of Apprenticeship Vacancies*

Apprenticeship vacancies shall be filled on the same basis as other permanent vacancies, and shall be subject to the posting practices at the plant. In the filling of apprenticeship vacancies in any given craft the seniority provisions relating to the filling of permanent vacancies within the seniority unit shall apply. In the event that the vacancy is not filled from within the seniority unit, the contractual provisions relating to intraplant transfers shall be available to employees desiring an opportunity to participate in the apprenticeship training programs. Representatives of the Company and the Union at each plant shall determine the method or procedures whereby apprenticeship vacancies not filled from within the seniority unit will be made generally

known to employees, which may include posting of vacancies at appropriate locations or any other method designed to acquaint employees not directly associated with the craft in which the vacancy occurs with the fact that such vacancy exists.

In the determination of relative ability and physical fitness in accordance with the applicable seniority provisions of the Basic Labor Agreement, the Company shall be limited to the use of such examinations and testing procedures as are related to the physical and training requirements of the craft involved.

4. *Retention of Apprentices during Periods of Reduced Operations*

An apprentice who has completed at least 25% of the total hours required to complete the apprenticeship program in which he is enrolled at the time that he would, by reason of the applicable seniority provisions, be laid off or demoted to a lower rated job, shall be required to make a binding election either to

(a) be laid off, demoted and recalled in accordance with all applicable seniority provisions; or

(b) be placed in layoff-training status and thereafter be entitled to benefits from the SUB Plan without regard to any other SUB eligibility requirements. The amount of such benefits shall be the same as if he had been laid off. An apprentice who has elected this option (b) shall attend such classroom training periods as are consistent with his status in the apprenticeship program in which he is enrolled. He shall also perform such on-the-job assignments as are consistent with the apprenticeship program in which he is enrolled provided, however, that such assignments shall not deprive any other

employee of employment to which such other employee would otherwise be entitled. Such layoff-training status shall cease at such time as the apprentice is entitled to be recalled to his normal apprenticeship position in accordance with the applicable seniority provisions.

5. *Craft Status*

Each apprentice, upon satisfactory completion of the apprenticeship program in which he is enrolled, shall thereafter be assigned to craft status and rate in accordance with Section VI-A-2 of the January 1, 1963 Manual, as amended August 1, 1968.

UNIONS' EXHIBIT 140

UNITED STEELWORKERS OF AMERICA
1500 Commonwealth Building
Pittsburgh 22, Pennsylvania

Date June 2, 1964

To: Messrs. Joe Goin, Marvin Miller, Emery Bacon, Frank Shane, Boyd Wilson, Tom Murray and Richard Moss

From: Maurice P. Schulte

Subject: Human Relations Training Subcommittee

This Union Subcommittee has a target date of September 1, 1964 to complete its studies and to formulate its recommendations on Training. The time remaining, the attitude of the industry representatives, and the nature of the job require that the Union members give this subcommittee top priority.

It is apparent that the industry Human Relations Committee people are adverse to recommending anything more than platitudes.

* * * *

There is specific need for—

1. Language that bilaterally establishes training and apprenticeship programs when required.
2. Definition or criteria for determining "qualified to do the work."
3. A provision that would insure training during lay-offs which tend to destroy training and apprenticeship programs.
4. A provision which sets a level of experience, job class, years of service or other demarcation below

which training is not required and seniority alone governs.

5. A provision which precludes the company from denying a job opportunity whenever training has not been afforded or made possible.

6. A provision requiring a trial period on the job prior to disqualification or testing.

7. A provision requiring advance notice of sufficient duration to permit (a) an equitable and orderly shut-down of an old facility, (b) training for the manning of a new facility, and (c) the operation of inter-plant, region and area job rights.

8. A provision that does away with "lily-white" units or departments.

9. A provision that precludes hiring new employees while there are lay-offs and which requires a minimum of employees to be in training so as to avoid the new hire-layoff problem.

10. A review of Factor 2 in the CWS Manual for possible updating.

11. For community participation in Union-Steel Industry Training Programs.

Possible Union Position

Since such are the Company's attitudes and positions and such in summary are the Union's needs it is suggested, in view of the September 1st target date, that the Union Human Relations Training Subcommitee schedule a meeting of its members during the week of June 8, 1964 for the purpose of reviewing its activities and formulating an Human Relations Committee training position. It is suggested that our position might in general include the following.

1. Training and apprenticeship programs to be bilaterally established.
2. Preclude the Company from denying promotion unless it has first provided adequate training opportunities.
3. Open all avenues of progression and demotion attending an increase or decrease in forces to all without regard to race, creed, etc.
4. Since unemployment and job opportunity is a community problem, the community must be made a party to the Union-Industry Human Relations Committee Training problem.

UNIONS' EXHIBIT 143

Steel Companies Coordinating Committee

and

United Steelworkers of America
Joint Testing Task Force

Report of Findings and Conclusions

The Joint Testing Task Force met in Pittsburgh eight times between April 13, 1966, and October 13-14, 1966. The last meeting was devoted to hearings which will be described below.

The Task Force explored in depth the views and opinions of both parties with respect to the role and conduct of testing for purposes of selection for training programs (other than apprenticeship), upgrading, transfer, assignment to new facilities, and IJOP transfers. The use of testing for initial employment selection, as for apprenticeship, was not within the purview of the Task Force, and was not considered except insofar as such uses of testing might also have an effect upon upgrading, transfer, and other purposes related thereto. Furthermore, the Task Force limited its attention to testing as it affects production and maintenance employees, although a small amount of data were collected concerning clerical and technical employees.

* * * *

Conclusions and Recommendations

The study shows that many of the plants of the 10 Coordinating Committee Companies do some testing for purposes of upgrading and transferring employees. The tests used, the volume of testing and the test practices and procedures followed vary among the plants covered by the survey. This variability reflects the difference in

facilities, job requirements, the labor market, seniority practices and provisions and Company philosophy.

During the discussions of testing there were several areas of concern expressed by the Union as follows:

1. The uniform lack of participation afforded to the Union in the testing process. Great Lakes Steel is the only exception.

2. The lack of fairness and impartiality of testing practices experienced in many instances.

   The companies representatives, however, stated that there was not any specific evidence of unfair practices. If any should occur, the companies representatives concurred that they should be eliminated.

3. The tendency to lower or raise standards depending upon how "tight" or "loose" the labor market is.

   The companies representatives, however, generally denied that test standards are altered. In response to the question on the survey, "Are passing or cutting scores, as used, varied to meet changes in conditions?", the answer was "yes" in only 20 testing situations, and "no" in 271 testing situations.

4. The withholding of test scores coupled with some Companies requiring evidence of an employee's subsequently having obtained "additional qualifications" as a basis for obtaining retesting rights.

   The companies representatives agreed that an employee should be advised as to test results and he should be informed of the deficiencies indicated by the results.

5. The lack of relevance of tests when related to the job requirements.

The companies representatives stated that most tests are relevant to the job or jobs involved. The great majority of tests reported are achievement tests developed locally and based upon job descriptions, manuals, and other directly related job materials.

6. The circumvention or dilution of seniority rights flowing from testing practices. This becomes doubly onerous when testing is applied to semi-skilled and unskilled jobs.

   The companies representatives stated that since 1962 there has been a substantial broadening of seniority rights in all of the companies and tests have aided in the proper placement of employees under the broadened seniority provisions. There have, in fact, been very few grievances involving the use of tests.

7. Repeatedly there have been cases indicating a vast difference between an employee's actual work performance and his test performance.

   The companies representatives responded that there was not any evidence brought forth on this point.

8. The contention that testing practices have an adverse effect on minority groups, will result in a "lily white" work force and preclude capable and work oriented employees from filling jobs.

   The companies representatives, however, responded that no data were brought forth or collected which supports this allegation.

9. The use of testing for the filling of temporary vacancies.

   The companies representatives responded that data were not gathered on this point.

10. Longer-service employees who have been removed from schooling for some time or never had such opportunity are handicapped by written tests.

    The companies representatives responded that data were not gathered on this point.

Based on the findings of the study of testing, the Companies and the Union Representatives on the Task Force present two separate sets of recommendations outlined below:

Companies Representatives' recommendations:

1. The companies should consider the establishment of guidelines on testing in order to insure that tests are developed, administered and the results used in accordance with recognized professional practices.
2. The companies should consider having Local Plant Management inform the Local Union as to the testing practices and procedures at the plant and any changes made thereto.

Union Representations' recommendations:

1. Under the existing circumstances the Union cannot support any testing program. However, it is recommended that the Union explore the application of a testing program of limited scope whenever the Industry devises a program that will (1) adequately relieve, as a minimum, those areas of complaint outlined in points 1 through 10 above, and (2) is restricted to a limited number of highly skilled production jobs and the testing procedures are addressed only to these jobs.

UNIONS' EXHIBIT 144

UNITED STEELWORKERS OF AMERICA
1500 Commonwealth Building
Pittsburgh, Pennsylvania 15222

Date May 28, 1967

To: Walter J. Burke, Secretary-Treasurer

From: Ben Fischer

Subject: TESTING (Some suggested guidelines)

There are no non-job related tests which can be accepted by the Union in determining promotion rights or ability to advance or absorb training. Such tests are lacking in adequate validation, unfair to older employees, loaded against culturally disadvantaged groups, not subject to adequate administrative controls and inconsistent with any reasonable view of seniority rights.

There are a number of real problems at which testing is aimed and we acknowledge that an effort should be made to solve these problems:

1. When it is necessary to determine whether an employee is able to do a job for which he applies and the information for making such a decision is not available, it makes sense to provide a completely job-oriented capsuled trial period which can be called a test but might better be given some other label. What is involved is an effort to find out whether the employee can do the job by directing him to perform certain tasks or demonstrate certain abilities under controlled test conditions.

Such a technique could be accepted if the test were related strictly and directly to the requirements of *the* job in question and if there were no scoring or passing grades established. If supervision concluded

that the test results revealed lack of "relative ability" it could deny the promotion and then have the burden of justifying its denial of the job to the senior applicant based on its opinion of test results (or other factors). Management's conclusion would be subject to challenge in a manner consistent with traditional dispute procedures over such issues.

2. Except where the contract provides otherwise, we reject any notion that a test can be directed toward duties or requirements of a job above the one for which the employee is applying.

3. Where the contract does provide that an applicant must be qualified to progress in a unit in order to enter the unit, a very different problem exists. In these instances, we do recognize that some determinations must be made beyond the ability to perform the job at hand because the contract provisions so declare.

We suggest two possible approaches:

a) Give the applicant a trial period of 30, 60 or 90 days during which his prior job is filled only on a temporary basis. Supervision should be able to provide the employee with enough exposure to the work and the problems of his new work unit to determine whether he will be able to progress. Supervision can develop an opinion through observation and evaluation of his work experience. If the employee can't make the grade, he can be returned to his prior unit. If he can make the grade, then the transfer can be made permanent as soon as possible but no later than the time limit as established.

b) Provide the applicant with the BPE test through BFE (or any successor procedure set up by the parties) and require that the appli-

cant take such training as the test indicates is required as a condition of transfer. This requirement would have to be spelled out in precise terms.

The two procedures outlined above could both be adpoted so that the transfer back could be invoked if the employee fails to comply with the requirement to take training—to his own job if within the prescribed time limits or to a bottom job in his prior unit if the failure to proceed arises later.

This memo does not cover the question of tests to govern entrance into apprenticeship courses or tests to determine qualifications for upgrading within a craft. These are separate though equally urgent problems.

cc: I. W. Abel
Joseph P. Molony
Bernard Kleiman
Frank Pollara
Dee Gilliam
George Butsika
Paul Fasser

UNIONS' EXHIBIT 145

UNITED STEELWORKERS OF AMERICA
1500 Commonwealth Building
Pittsburgh, Pennsylvania 13222

Date November 13, 1967

To: Walter J. Burke, Secretary-Treasurer

From: Ben Fischer

Subject: Study Committees

Here are the reports you asked for. I will be in the office Tuesday AM on November 14th if you have any questions. If there is anything further that we can get together for you, you can reach me today until 2:30 PM at the Bethlehem Second Annual Meeting in Phila., Constitution Room of the Sheraton Hotel, LOcust 8-3300.

Bf:mm
attachments

APPRENTICE STUDY

We have reviewed a fair amount of information regarding some basic facts about the number of apprentices in each craft and in each company—in its major plants. We have some data about the nature of the rules for entry.

The task force members did discuss possible methods of improving the apprentice system to make it fairer to present employees desiring entry and to racial minorities. These discussions were strictly exploratory.

The group made tentative plans to test out ideas with representative local parties but these plans have not been completed due to other pressures and considerations. If this is desired, we can proceed now and hold such meetings—perhaps during December.

The Union members requested a complete analysis by race of the crafts. This has been completed and delivered to Walter Burke.

The basic problems as I see them are:

1. How can we qualify present employees fairly and realistically. This involves drastic revision of the age limitation, greater orientation to actual steel work requirements, basic educational features in the training routine for those who need it, a shortening of the periods, adjustment of the rates including some principle of rate retention, and some solution to the vexing matter of retention of apprentices during reduced operations.

2. How can we attract Negroes—new hires and present employees—to achieve better racial balance in the crafts? The solution to this is related to the questions raised in #1 above and to the outcome of the pilot training program.

3. How can we assure enough craft employees to reduce the pressures for overtime and for contracting out? The key to this matter is an approach toward the constantly seesawing level of craft requirements; it varies by reason and by a wide range of other problems.

4. Is apprenticeship the only route or even the best route for qualifying maintenance workers? This question arises sharply because if maintenance employees were in lines of progression, subject to up and down movements, the need for overtime would be reduced, hiring difficulties during tight labor market situations would be somewhat relieved and a major cause of contracting would be abated. It is also interesting to note that some companies do get most of their maintenance personnel through up-grading and on-the-job types of training. Except for machinists this procedure has not been unusual. To implement this type of approach would perhaps require some type of intermediate jobs in some situations. But many maintenance men who are fully qualified came up directly through the helper route.

I would suggest that if further work is desired in the craft training area by a task force, it be given some direction and be manned by persons with a broad scope, beyond experience limited to apprentice training.

TESTING STUDY

I did not participate in the work of the testing task force. Much data was collected. Meetings with representative local parties were conducted.

More recently, efforts to review possible approaches on a broad basis have taken place. However, no precise or even general conclusions have been reached.

These are some of the problems:

1. The job-oriented tests are, or should be, capsuled trial periods. Disputes over test content, procedures and conclusions are within a manageable area of debate, not drastically different from traditional disputes over ability questions. The review of such tests is a fit subject for local review and negotiation; at the most we can provide very general guidelines for local parties.

2. The simple reading, writing and arithmetic tests are appropriate if the job requires these skills. How to develop and administer is a relatively simple matter over which local parties can easily negotiate, where necessary, and with a minimum of guide lines or guidance.

3. The tests in #2 above become troublesome when they relate not to a job which the employee is seeking but to jobs further up the line—because there is a question regarding ability to progress or to absorb training. This issue has been sharpened by two events—a) the establishment of contract rights to fill vacancies in foreign lines of progression and even in foreign departments, divisions and plants due to 1963 and 1965 contract changes; and b) the fact that this problem arises along with efforts to overcome racial inhibitions on progression and choice of type of work. There is no doubt that some testing programs do interfere with efforts of racial minority members to enter areas not previously fully available.

4. Tests which seek to measure aptitudes by psychologically-oriented written tests (multiple choice, identification, etc.) are obnoxious to our members. They may be accurate on the average in some refined circumstances. But averages do not account for the rights of each individual member. Actually,

most of the tests are badly conceived, badly expressed by people who are peculiarly unable to write plain or even accurate English, badly administered and slanted against the older employee, the less educated and the foreign born. The steel industry in general uses these tests inexpertly, without much regard for administrative safeguards, validation requirements and pertinent consideration of what is actually going to be required of the employee to perform assigned work.

Whether these tests are designed to restrict racial and ethnic minorities, they do have this effect. They also weigh against older employees whose experience with taking tests is far in the past; it is likely that most test administrators are not disturbed by this since they prefer younger people in starting jobs anyway since what they learn can be of value to the company for a longer period of time.

If some understandings are not achieved on testing through the study program, it seems at least possible—and perhaps likely—that testing can become a very troublesome issue in 1968 collective bargaining negotiations.

UNIONS' EXHIBIT 146

Confidential May 7, 1968

Minutes of General Contract Review Committee Meeting

Meeting at U.S. Steel Building, Room 2318,
May 1, 1968 at 2:10 P.M.

For the Union	*For the Industry*
W. Burke	W. Shaver—U.S. Steel
B. Kleinman	J. Bohne—Youngstown Sheet & Tube
B. Fischer	G. Angevine—National Steel
P. Fasser	G. Flaccus—Jones & Laughlin
M. Sam	

* * * *

Testing

The Companies members raised the question of whether or not the Union members had any ideas as to the approach of a testing program.

The Union members explained that the discussion on testing should be dealt with on an Industry-wide basis, with its affects on Negroes and discriminatory practices.

Discussion took place on present testing requirements existing in the Industry and the Companies members pointed out that the change in employment hiring practices would necessitate getting deeply involved in a testing program.

The Union members explained that testing of employees who fill bottom jobs in a line of progression was not necessary. If it was necessary to find out if a Second Helper could perform the work requirements of a First Helper, then do it when you want him to be a First Helper.

The Union further pointed out that lines of progression in a group of related jobs provide the necessary training ground that does not require testing.

The Companies members took exception to this on the grounds that all lines of progression do not provide the proper relationship of jobs.

Further discussion took place on the above item.

The Union members raised the following questions in the area of testing:

1. How widespread is the testing program in the Steel Industry?
2. What type of testing is taking place (whether formal or informal)?

The Companies members responded by stating that testing programs were all over the map and depending on the Department Supervisor it may be formal or informal.

Meeting adjourned 4:30 P.M.

Next meeting scheduled May 7, 1968.

UNION'S EXHIBIT 151

MINUTES OF MEETING
JOINT INDUSTRY-UNION COMMITTEE ON
APPRENTICESHIP, ROOM 2318,
U. S. STEEL BUILDING—APRIL 26, 1966

Present for the Industry:	Present for the Union:
Kirkstadt	Fischer
Dillon	Miller
Moran	Gould
	Spitz

The Company mentioned that at the last meeting a review had been made of the Study on Apprenticeship which had been conducted in 1964 and that it had been agreed that the Union would meet prior to this present meeting to formulate in a general way its ideas and proposals in the area of apprenticeship. Spitz indicated that this had been done. He said that the review of the 1964 material indicated that whereas some of it was applicable to the present situation, some of the material was unrelated. He stated that the Union was concerned that this Committee not go too far afield in its discussions and considerations. The Union felt that the area of concern should be restricted so that something constructive might be forthcoming. He cited the following as the basic areas of the Union's concern:

* * * *

2. The Union was concerned that present employees of the Company have an adequate opportunity for entrance into apprenticeship programs in such a way that their entrance into these programs was possible in a practical sense. Spitz pointed out that present employees were work-oriented and would take such training programs much more seriously than many of the young people out of schools who are presently

being chosen for industry apprenticeship programs. He mentioned that these people now feel left out and excluded, and this presents a serious problem. He cited the long-standing complaint of Craft Helpers that they should be allowed to enter the Craft.

Spitz pointed out that many of the present employees might lack the necessary formal education but this might be overcome, and the Union's experience shows when given a chance these people can make out well.

The question of people from minority groups is also involved here. Various tests, etc., which have been used in the past have been designed for other ethnic groups, and in may respects are unfair as they are applied to people from minority groups, particularly the Negro.

Spitz said that the industry needs people as trained craftsmen and there is tremendous pressure from the minority groups to upgrade their level of employment, and both of these needs could be accomplished:

(a) In determining the hours actually needed in an apprentice program, it should be possible to include an elementary and preliminary form of program designed to overcome the lack of formalized training for some of the present employees (for example, a lack of elementary mathematics instruction). Spitz stated that it was not the intention of the Union to ask that people who are illiterate be trained in literacy, but certain lacks in formal education could be overcome in a manner similar to what was done with many returning veterans after the Second World War. Under the GI Bill these veterans were eligible for educational benefits, and for those who did not have a high school diploma special programs were established to overcome their lack of formal education and they were able to get equiva-

lency status for their high school diploma. Something similar in principle to this program could be developed with respect to apprentice training programs. The person who had the necessary formal educational background could skip this part of the program. A person who qualified except for this aspect could be required to undergo this training.

(b) With respect to present employees who might enter an apprentice program, there is a serious question relating to retention of earnings. Many otherwise qualified people who would make excellent craftsmen, but who have a family to support, could not afford to drop to the Job Class 2 level even if they could be selected for apprenticeship programs. The Union seeks agreement that present employees selected for apprentice training programs would at least retain their present hourly rates until they reached a comparable pay level in the apprentice program.

(c) With respect to present employees, credit should be allowed toward completion of an apprentice program for related work which has been performed. Present employees who have been on jobs which are related to the Craft could be given credit for each year of related work up to some agreed upon maximum amount. For example, a Craft Helper who had been on the Helper's job for 10 years or more might be credited with completing one-half of his apprenticeship on the basis of his years on related work, but no amount of experience might give him more credit than one-half of the program. If, of course, such a person might be deficient in elementary math, etc., he might be required to take a program in this. Moreover, it might be possible that such a person, when put into the apprentice program, could not perform at the level where his years of service

on related work entitled him to be slotted. In such cases it could be possible to work out a formula where he would be downgraded to the level where he could perform the work. Present employees who had not performed any related work should have the same retention rights as those who had been on related jobs, but some much less liberal formula could be applied to them for crediting their previous work with the Corporation.

3. The question of continuity of training for apprentices in lay-off situations would have to be met somehow.

4. An examination is necessary of the question of what happens when apprentices complete a program and there are no vacancies available.

* * * *

Fischer indicated that with respect to the question of liberalization of entrance requirements into the craft, we are concerned not only with present employees but with all people. However, we are concerned with the content of the apprentice programs and with the questions of testing and training where the functions of the committees on testing and training do overlap with this committee in this area, but the Union is not at all interested in "watering down" the craft. The Union states that on the question of testing as it relates to apprentice programs, it feels that any testing should be discussed and be germane to the actual work involved.

* * * *

UNITED STEELWORKERS OF AMERICA
1500 Commonwealth Building
Pittsburgh, Pennsylvania 15222

Date July 13, 1966

To: Secretary-Treasurer Walter J. Burke; Directors Joseph Germano, James P. Griffin and Charles Younglove; and Messrs. Ben Fischer, Lawrence Spitz and Frank Pollara

From: Alex Fuller

Subject: Suggested Proposal to Company Members

It is hoped that at the future meetings of the Joint Study Committee a strong stand will be taken to open all of the apprenticeship programs to all members of our Union and that the last vestige of racial discrimination will be removed from these programs in keeping with our long standing policy and both the letter of federal law and executive action of the president.

AF/JEW:as

UNITED STEELWORKERS OF AMERICA
1500 Commonwealth Building
Pittsburgh, Pennsylvania 15222

Date July 21, 1966

To: Alex Fuller

From: Lawrence N. Spitz

Subject: Apprenticeship Study Committee

The problem of opening existing and future apprenticeship programs in the Steel Industry to *all* of our members has been strongly stressed by the Union Representatives on the Apprenticeship Study Committee. In doing so, we have utilized the data obtained from previous studies which show an appalling lack of omission to these programs for minority groups. Specifically we are addressing ourselves to the following items:

1. Studying the feasibility of developing an apprentice program that would give preference to our members who are helpers in a particular craft or other persons with similar work experience to enter the program as apprentices.

2. An arrangement that would give credit to such employees on time spent on related work.

3. A program that would encourage our members to enter apprenticeship training and enable them to retain their present rate of pay. The existing programs discourage our members from entering such programs (in addition to other prohibitions unilaterally imposed by the Corporations) by virtue of the fact that a man has to take a drastic reduction in pay in order to enter such programs.

4. A program that would provide for "pre-apprenticeship training" designed to give our minority group members an opportunity to develop and hence start

an apprenticeship training program on an equal footing.

In summary, the topic you raised in your July 13, 1966 memo is very much in the forefront in the Apprenticeship Study Committee's deliberations.

[Distribution list for copies omitted in printing]

MINUTES OF MEETING
JOINT INDUSTRY-UNION COMMITTEE ON APPRENTICESHIP
U. S. STEEL BUILDING—JULY 28, 1966

For the Industry:	For the Union:
Kirkstadt	Spitz
Dillon	Gould
Moran	

Spitz informed the Industry representatives that John Eckman and DeLaurse Jones will function as task force members on this Committee. They were unable to attend the meeting today.

Spitz cited the developments since the last meeting—that is, the Union being bombarded from a multiplicity of sources with questions as to whether this Committee will accomplish anything for minority groups. These questions have come from the Federal Government and from within the Union. There is, for example, a formal request from the Civil Rights Committee of the United Steelworkers. Spitz stated that there were three items the Committee could orient itself to:

1. The mandate for the Committee as contained in the contract.
2. The previous study of 1964.
3. The Union's suggestions for changes in the apprenticeship program that were advanced at the earlier meetings.

He stated that using these three points of orientation, we might develop our procedure for the future. Spitz presented to the Industry members his July 27, 1966, memorandum on a proposed method of procedure for the Apprentice Study Committee (copy attached).

Kirkstadt asked which items in the 1964 report were considered inadequate by the Union. The Union cited as one example the fact that the number of apprentices being trained was not broken down by crafts.

The Company presented its proposal for a questionnaire to be sent to all of the corporations (copy attached). This proposed questionnaire was reviewed and suggestions made for amendment. The Union proposed a question be entered prior to the present No. 1 which would ask each Company to list the elements in each craft in which proficiency is required to qualify for the standard rate, that is, the elements where proficiency is required in redetermination of qualifications.

Spitz mentioned that the Union and Corporations have had problems on the question of progression within the craft from starting to intermediate to standard rate. The Industry representatives proposed as language for this question the following: "List the job requirements by work elements in each craft in which proficiency is required for obtaining the standard rate (that is, the elements required in the redetermination)." The Union agreed to this language.

Reviewed the rest of the document and made changes therein. These changes are noted on the attached copy.

The Union raised the question that the last item in the schedule did not examine into whether or not the requirement for a high school diploma could be eliminated.

The Industry representatives stated that this was not a problem with this Committee—it should be or was properly the problem of the Training Committee. The Union said that the Training Committee would have to know what they were training people for and that it was this Committee's responsibility to establish the standards or levels. The Training Committee would have the responsibility of developing methods to train people to these levels.

The Union mentioned again that it was absolutely necessary to open the doors wider to members of minority groups.

The Industry agreed to revise the draft questionnaire on the basis of discussions today, send copies to the Union for its review, and then arrange for a further meeting. Meeting adjourned at 12:15 p.m.

John N. Gould

JNG/by

UNITED STEELWORKERS OF AMERICA
1500 Commonwealth Building
Pittsburgh, Pennsylvania 15222

Date: February 7, 1967

To: File

From: J. W. Eckman

Subject: Minutes of Meeting

Joint Industry-Union Committee on
Apprenticeship
Room 2318, U.S. Steel Building
January 6, 1967—2:00 p.m.

For the Union	*For the Company*
Ben Fischer	Joe Moran—U.S. Steel
Frank Pollara	Ben Boyleston—Bethlehem Steel
DeLaurse Jones	William Dillon—Inland Steel
Bill Scully	Harold Kirkstadt—Republic Steel
Jack Eckman	

The purpose of this meeting was to review the completed survey which resulted from the questionnaires which had been sent out to the various plants. The summary as such was reviewed, and several questions pertaining to some of the information contained therein was discussed.

Fischer asked the Company what they do in areas where they have no apprenticeship program. The Company noted the other means shown in Exhibit H for obtaining Journeymen, such as hiring off the street, upgrading from related jobs, etc.

Polara questioned the number of blanks on Exhibit A indicating no apprenticeship program had been developed. He felt this must be incorrect and cited examples at certain plants where he felt there were apprenticeship pro-

grams. The Company representatives pointed out that this survey covered only the last five years; while in many cases there had been apprenticeship programs in the past, where these programs had not been used for the last five years or longer, they were not shown in the survey. They offered another reason for the blanks—in a particular plant there may not have been use for a certain trade, for example, Lead Burner.

Fischer asked if this survey included people who came through apprenticeship courses other than those operated by the Company. The Company answered that this, of course, was included but there was no breakdown to show the percentage.

There followed a discussion of the relative cost of outside contractors compared with industry tradesmen. Pollara said our fringe benefits and hourly wages combined are lower than the AFL rates being paid. This led to a discussion of various rates of pay, benefits, and extended vacations.

Fischer and Pollara stated that the Company policy was causing discrimination against minority groups, resulting in a lily white trade and craft grouping. Pollara stated that both the high school requirement and the testing for trade and craft jobs was unnecessary and should be done away with. To substantiate his thinking, he pointed to the survey which indicated 40% of all Journeymen presently employed in the plants are not high school graduates. The Company answered that this figure reflects the bygone days when the trades were considered to be highly desired jobs and many people who entered were of high school caliber or better. During this time, the trade in many cases was considered a replacement for something better than going to high school. However, in recent years the proven method of selecting people for apprenticeship has been by way of the high school or equivalent requirement and testing procedures.

Fischer said that this whole thing (the survey) shows there are a lot of things that take place in a lot of places in a lot of different ways.

It was suggested that we could make better use of the information gathered in this survey by pursuing a course similar to that followed by the Testing Committee, that is, to select certain Locals to come to Pittsburgh to give testimony before this committee relating to their experiences and problems with the apprenticeship programs. Fischer felt that before this was done, it would be better for the Union people to take time to thoroughly review the information which had been sent in by the various plants so that we would be fully aware of what we were talking about before deciding to bring Local people in. If this were done first, it might be unnecessary to bring them in. He concluded that much of the information we would receive from our people would be from tradesmen who are interested in perpetuating the present situation anyway.

It was agreed to meet again on March 7, 1967, at 2:00 p.m. in the U.S. Steel Building, room to be determined later.

JWE/by

UNIONS' EXHIBIT 157

PROPOSALS OF THE UNITED STEELWORKERS OF AMERICA FOR THE 1959 NEGOTIATIONS

In accordance with the 1959 Wage Policy of the United Steelworkers of America, annexed hereto, the Union herewith submits its proposals for the 1959 negotiations. These proposals were prepared by the Union's Negotiating Committees after consideration of local union resolutions and drafts based thereon, after long and careful consideration of the needs of our members and the positions of the parties, and after thorough analysis of the operation of the collective bargaining agreement and the pension, insurance and supplemental unemployment benefits agreements.

Numerous provisions of the respective agreements, which have not been subject to complete and thorough review by the parties since 1956, must be changed, and certain new provisions must be added.

A substantial wage increase, cost-of-living adjustments, shorter hours of work, weekend premium pay, supplemental unemployment benefits, improved insurance and pension provisions, full union shop, improved holidays and vacations, a workable grievance procedure and better contract terms are essential to achieve the mutual objectives of the companies and the Union—sound industrial relations and genuine cooperation between the parties.

In formulating and presenting the Union's proposals, no attempt has been made to spell out the changes in contract language which are required by these proposals. When agreement is reached in principle, this can be done expeditiously and jointly by the parties. The proposals herein are generally applicable to all companies. No attempt has been made to list any additional contract changes which the Union deems necessary for particular

companies. This has been or will be done by the Union's negotiating committees in negotiating sessions with the respective companies.

It is essential in these negotiations to make progress toward the achievement of the goals herein set forth.

* * * *

27. *Non-Discrimination Clause*

Incorporate a clause outlawing discrimination against any individual on grounds of race, creed, color or national origin in all matters pertaining to hiring, wages, hours and working conditions.

* * * *

UNION'S EXHIBIT 158

Additional Recommendations for Contract Changes

The Union previously has submitted to the Human Relations Research Committee certain recommendations for contract administration changes which do not fall within the scope of any of the established subcommittees. Listed below are additional recommendations by the Union for contract administration changes.

On the whole, the matters covered herein are of general application to all companies. Also included are certain contract changes made in 1960 at United States Steel, but not at the other companies. Other intercompany contract differences or inequities are still under study by the Union and will be raised at an appropriate time.

* * * *

10. *Non-Discrimination*

Incorporate a clause outlawing discrimination against any individual on grounds of race, creed, color or national origin in all matters pertaining to hiring, wages, hours and working conditions.

UNIONS' EXHIBIT 232

STATEMENT OF
BASIC STEEL INDUSTRY CONFERENCE
UNITED STEELWORKERS OF AMERICA,
WASHINGTON, D.C.

February 13, 1977

This Statement expresses in broad terms the 1977 bargaining goals of our members in the Basic Steel Industry and the Union's collective bargaining program for meeting those goals. This program is drawn in the light of the collective bargaining resolutions adopted by the 18th Constitutional Convention, the Statement of the International Wage Policy Committee adopted in December, 1976, and the discussions and deliberations which have taken place at the January 12-13, 1977 meeting of the Basic Steel Industry Conference Planning Committee and the February 12-13, 1977 meeting of the Basic Steel Industry Conference.

In adopting this Statement, we recognize that some problems are common to all steel companies, while other problems are of a more specialized nature. This Conference does not intend by virtue of this statement to limit any negotiating committee in the resolution of individual company problems, but rather we encourage the Union members of each company negotiating committee to exert every effort to deal with such problems.

* * * *

EQUAL OPPORTUNITY

Our Union has always been dedicated to assuring equal opportunities in the workplace for all Steelworkers. Nevertheless, we cannot ignore the fact that in many plants, minority employees have not received fair treat-

ment from the employer: minority employees in some instances are not treated fairly in hiring, or they are assigned only to certain undesirable parts of the plant.

By means of the recent industry-wide Consent Decree in Basic Steel, we have taken far-reaching steps to improve the situation for such victims of the companies' discrimination, in a manner which is fair to all Steelworkers. We must continue to insist that all employers put a stop to discriminatory practices. Employment discrimination is based substantially upon the practices of employers in the hiring and initial assignment of employees. We must take all steps to insure that employers hire and initially assign employees on a non-discriminatory basis, and that violations be resolved through applicable contractual procedures. In addition, we must maintain our policy of reexamining existing contract provisions and procedures to insure that they foster sound relationships in all plants and do not permit discrimination. We must also take affirmative steps to eliminate any discriminatory fringe benefit provisions, as required by law.

TESTING AND TRAINING

Many of our members of all races and nationalities, and of both sexes, are denied equal employment opportunities because they are inadequately trained, are subjected to unfair tests when seeking advancement, or are blocked by artificial entrance requirements from entering apprenticeship and other training programs. These difficulties must be overcome. Training for non-craft jobs must be expanded and be funded both by industry and by government. All testing must be eliminated except where management can demonstrate that there is no adequate substitute for determining qualification, that the test content is truly related to the job and the training therefor, and that the test and its administration are entirely fair and non-discriminatory. Where practical, a trial period rather than testing should be used.

Procedures should be developed to provide the Union representatives at all steps of the grievance procedure with the necessary information concerning tests which are in dispute so that the Union may make an evaluation on the basis of the facts involved in each situation.

* * * *

UNIONS' EXHIBIT 234

STATEMENT OF
BASIC STEEL INDUSTRY CONFERENCE
UNITED STEELWORKERS OF AMERICA,
PITTSBURGH, PA.

December 7, 1979

I. INTRODUCTION

The Basic Steel Industry Conference is vested by the International Convention with the authority to implement the Wage Policy of our Union and apply that Wage Policy to the Basic Steel Industry. It is therefore appropriate that we set forth in this statement the 1980 bargaining goals of our members in the industry, and our Union's collective bargaining program for meeting these goals. This statement is drawn in the light of the collective bargaining resolutions adopted by the 19th Constitutional Convention, the statement of the International Wage Policy Committee adopted November 9, 1979, and the discussions which have taken place at the December 6-7, 1979 meeting of the Basic Steel Industry Conference.

* * * *

Testing and Training

Many of our members of all races and nationalities, and of both sexes, are denied equal employment opportunities because they are inadequately trained, or are subjected to unfair tests when seeking advancement, or are blocked by artificial entrance requirements from entering apprenticeship and other training programs. These difficulties must be overcome. Training for noncraft jobs must be expanded and be funded both by industry and by government. All testing must be elimi-

nated except where management can demonstrate that there is no adequate substitute for determining qualification, that the test content is truly related to the job, and that the test and its administration are entirely fair and non-discriminatory. Where practical, trial period rather than testing should be used.

* * * *

UNION'S EXHIBIT 235

UNITED STEELWORKERS OF AMERICA

COMPANY-LEVEL CONTRACT ISSUES

DISCUSSION PAPER

for

1974 BASIC STEEL NEGOTIATIONS

COMPANY LEVEL CONTRACT ISSUES
DISCUSSION PAPER FOR 1974
BASIC STEEL NEGOTIATIONS

Reports of the various technicians to the Technical Assistance Committee included many contract issues which are not of industry-wide significance.

These issues are summarized herein for the information of the Chairmen, Secretaries and Technicians of all ten company level Negotiating Committees.

The purpose of this summary is to enable the leadership of each Committee to know subjects that are being discussed in other committees.

The sections and marginal paragraphs referred to herein are as they would appear in the United States Steel Agreement.

* * * *

APPENDIX F—MEMORANDUM OF UNDERSTANDING ON TESTING

1. Provide authority for the local union to review and/or approve tests presently in use and to observe the testing procedure.
2. Provide for the elimination of all tests except where:
   a) Company can demonstrate no adequate substitute.
   b) If needed, tests must be job related.
   c) Test to be fair and non-discriminatory.

* * * *

UNION'S EXHIBIT 241

STATEMENT ON FAIR EMPLOYMENT PRACTICES

BY

DAVID J. MCDONALD, PRESIDENT
UNITED STEELWORKERS OF AMERICA

June 13, 1963—Washington, D.C.

From the inception of the United Steelworkers of America, one of our principal concerns has been the establishment of procedures for guaranteeing full equality of opportunity in all aspects of employment, conditions rarely found to exist in steel and allied industries prior to 1936.

Among our prime responsibilities as a trade union has been to provide such procedures under the terms of the contracts we have negotiated from time to time.

The effective manner in which we have been able to do this and consequently to free the steelworker from the economic restrictions and discriminatory practices which had been his lot prior to 1936 is shown in the following accomplishments:

(1) The establishment of a wage-rate inequity program, beginning in October 23, 1945, which has established equal pay for equal work through the classification of jobs. This program has eliminated wage-rate inequity among over 80% of the employees now covered by contracts negotiated by the United Steelworkers of America. The program is applied regardless of race, color, creed or nationality.

(2) The elimination in 1954 of the North-South wage differential which had existed for so long.

(3) The negotiation of pension and insurance plans which permit steelworkers to retire under conditions

which provide substantial financial security without regard to any of the physical or cultural differences listed in the above paragraph one.

(4) The negotiation of an anti-discrimination clause in the April 1962 agreement, which in combination with other provisions contained in the Seniority Section of that contract, makes it now possible for workers to move freely into lines of progression and into jobs which had previously been denied members of minority groups because of racial or other restrictions.

Inherent in the application of these procedures is greater security on the job and the establishment of training and retraining programs which will qualify workers for advancement to positions formerly denied them and will, if promptly and properly drawn up as the need becomes apparent when technological changes are contemplated, eliminate the tragic displacement of workers which confronts us today in almost every branch of industry.

These gains have not been easily won nor have they been accomplished in a relatively short period of time. In no sense do we consider them a complete answer to the problem we are faced with even in the steel industry.

No really significant change in the discriminatory practices which still exist in employment can be brought about unless a Federal fair employment practices law is enacted. Such a law in addition to containing punitive measures for dealing with recalcitrants must provide for adequate administrative procedures under which the law can be properly and effectively applied.

In January and February of 1950 our union conducted a series of conferences in support of a Federal fair employment practices law in major cities across the country. We were joined in this by the Legislative and Judicial branches of the United States Government, by other federal officials, state, county and municipal government rep-

resentatives and all of the major civic and community organizations who were in support of fair employment practices legislation.

During each succeeding year similar efforts have been made to have a Federal law enacted but with no success.

It is however interesting to note that during the last 13 years, 22 states and more than 50 cities and municipalities have enacted fair employment practices laws and ordinances and almost without exception this took place in areas which were highly industrialized.

Our union, along with other trade unions and organizations whose civil rights policy corresponds to ours, has given full support to the executive orders which have been issued by the various Presidents of the United States since 1941. While doing this we have done so as an interim means for curtailing discriminatory practices but have never accepted this type of executive action as a substitute for an enforceable law.

On May 13, 1957, in accepting the National Conference of Christians and Jews Brotherhood Award from Mr. Benjamin F. Fairless, the late past president of the United States Steel Corporation, I made reference to the fact that certain highly influential segments of our society refused consistently to support legislative measures to curtail discrimination. At that time I said that the job which must be done is not a one man job, it is a job that requires cooperation between industry, labor, religion, education, civic and community organizations and the countless other groups that each represent some part of the more than 180 million people who now live within our 50 states and territories. The need for this cooperation exists more today than at any time in the past.

It is for this reason that I feel we should re-emphasize what I made reference to at that time, "that the job cannot fully be done unless every responsible group in our national community assumes its share of the respon-

sibility to speak out firmly for compliance with all aspects of our court's rulings banning segregation and for the enactment of Federal fair employment practices legislation which is so badly needed.

Particularly do I call on those who own and manage the great steel, textile, lumber and chemical industries throughout the country to use their wide influence to help set the pattern in which these things can be realized.

Most of the headquarters of these industries are located in the northern part of the country and it is here that the policy is made and administrative procedures are formulated. It is the obligation of those who have this responsibility to institute a system of education for plant managers and other supervisory personnel, particularly in the South where the problem is so acute, so that they can join with us in helping to establish real American democracy. In brief, our workshops should be made the schools for democracy."

During the last two and one-half years our union has given full support to all of the present administration's program for securing the rights of the individual. In May of 1961 we joined with other unions in pledging full support to the President's committee on Equal Employment Opportunity and since that time we have issued directives to all of our members defining their obligations as individuals and our obligations as a trade union to comply with all aspects of Presidential Executive Order 10925.

In a meeting between representatives of our Civil Rights Committee, our general counsel and the administrative staff of the President's Committee held in Washington on November 10, 1961 we laid the ground work for cooperating with the President's Committee. At that time we were prepared to sign a formal statement with the President's Committee committing our union to this type of cooperation. On November 27, 1961 our union

sent letters to the chief executive officers of seventeen basic steel companies requesting their cooperation in making the executive order meaningful. Similar letters were sent to the executive officers and every company with which we hold contracts.

After the negotiation of the anti-discrimination clause in our April 1962 contracts, all of our local unions were sent directives outlining the manner in which the new clause was to be applied and the manner in which municipal, state and federal agencies were to be used where contract provisions did not cover specific types of discriminatory practices.

As one of the trade unions which signed the "Joint Statement on Union Program for Fair Practices" with the President's Committee on November 15, 1962 we are pleased to note that progress has been made by the Committee since that time but the complications which continue to grow because of technological improvements and automation with the resultant displacement of hundreds of thousands of workers in all types of industries presents an alarming picture for among this growing unemployed group we find that the non-white continues to make up an ever growing larger proportionate percentage than the white. The restrictions which have prevented them for training for higher skilled jobs must be removed. Apprentice and vocational training programs must be opened to all workers and can no longer be unilaterally operated. We are negotiating with the steel industry now to implement this idea.

We believe that there is no further justification for dealing with the problem of discrimination in employment in a piece meal fashion. Our union pledges itself to place every resource at our disposal in support of legislation which will effectively curb discrimination not only in employment but in all other facets of our American life and we are hopeful that the present administra-

tion under the leadership of President John F. Kennedy will quickly inform Congress that it regards the enactment of such legislation as the first order of business. We assure him that we will give our full support to whatever he does in this area.

In addition, we will fully support the President in all that he does to maintain law and order in these difficult times and hope that the great majority of Americans everywhere will do the same.

UNION'S EXHIBIT 245

UNITED STEELWORKERS OF AMERICA
CIVIL RIGHTS COMPLAINT FORM

Local Union #1165 District #7 Check or Badge #1510

Date January 11, 1979

Name of Complainant(s) George A. Dixon

Address R.D. #1 Tel. #593-5738

Parksburg City | Penns. State | 19365 Zip Code

/s/ George A. Dixon
Signature of Complainant(s)

NATURE OF COMPLAINT

I, George A. Dixon, contend the Company is and has been discriminating against me because of my race, pertaining to job promotion and upgrading.

The latest discrimination occurred after the Company was forced through the grievance procedure to afford me an opportunity to be tested for a position of Welder. I passed the test and was given 2 days on the job before being terminated. As of this date, a junior employee is holding that particular job.

The following are jobs I previously have signed for but for various reasons have not been able to obtain any of them. Junior people are now filling these jobs.

1. Die assembler
2. Tool grinder
3. Operator plant #3
4. Machine apprentice

RELIEF REQUESTED

I ask the Company to afford me the same opportunities as other employees, to be placed on my proper job and to pay me any monetary losses to date.

This alleged discrimination was based on (check):

Race ☒ Color ☐ Religion ☐ National Origin ☐ Sex ☐ Age ☐ and is with regard to (check):

Initial Hiring ☐ Assignment ☐ Promotion-Up Grading ☒ Transfer ☐ Discharge ☐ Lay Off ☐ Recall ☐

* * * *

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1165
AFL CIO CLC

May 9, 1979

To: James L. Slattery, Chairman of the Joint Company—Union Civil Rights Committee

From: Thomas E. James, Chairman
Civil Rights Committee Local #1165

Subject: Preliminary EEO Office Investigative Report—George A. Dixon—dated 1/16/79

Upon completion of your preliminary investigation, we, the Civil Rights Committee, still find your report appalling because of the nature in which Mr. Dixon was afforded opportunities but also relieved from these jobs in question before being allowed a full opportunity to progress through what we consider a proper learning period.

1. In reference to the job of Welder—We cannot find in the history of the Machine Shop or elsewhere in Lukens where a trade and craft employee was literally demoted from a craft in which he was assigned because of an evaluation from Mr. T. A. McKearney or anyone from the Quality Assurance Department.

It has been stated by Mr. Dixon and the committeeman from the area that Mr. Dero had arbitrarily given Mr. Dixon an ultimatum to be able to weld to his satisfaction within four (4) days or else. It seems perfectly clear to this committee that Mr. Dero had every intention of not affording Mr. Dixon a fair opportunity since he reneged and terminated Mr. Dixon after two and one half days on the job.

In keeping with our seniority sections of our current labor agreement, we feel that Mr. Dixon should have been afforded an opportunity to be tested ahead of or along

with Mr. James Nelson since Mr. Nelson was a junior employee.

2. In reference to Operator Plant # 3: We cannot find where Mr. Dixon's work performance was unsatisfactory to any extent that he was any worse than the employees who were assigned to that job at that time. If there are records to substantiate his performance in comparison to other employees, we would appreciate the Company presenting them. It has been stated by the committeeman in that area, that Mr. Dixon has no problems performing any of the following jobs:

a. Die Assembler

b. Tool Grinder

c. Operator Plant # 3

3. It is the consensus of this committee that past complaints would dictate to us that there definitely exists a pattern of discrimination in the Machine Shop Department.

We strongly urge the Company to complete a more thorough investigation into why Mr. Dero seemingly wants to change the rules (or practices) when seniority, etc. suggests that a black person is in line to be promoted.

cc: Sam Santoro, Staff Rep USWA
Benjamin Pilotti, #1165 President
John Robinson, EEO Office

UNITED STEELWORKERS OF AMERICA
CIVIL RIGHTS COMPLAINT FORM

Local Union #1165 District #7 Check or Badge #6224

Date 2/28/79

Name of Complainant(s) Paul E. Butcher

Address 565 South 1st Avenue Tel. #384-2958

Coatesville	Pa.	19320
City	State	Zip Code

/s/ Paul E. Butcher
Signature(s) of Complainant(s)

NATURE OF COMPLAINT

I, Paul E. Butcher, contend the Company is discriminating against me by not allowing me to be relieved from working the all midnight shift (12—8 A.M.) which I have worked for approximately nine (9) years.

I contend the Company is in violation of my rights to a different work assignment and because of the attitudes of my supervision, I believe I am being discriminated against because of my race.

There is no agreement between the Union and the Company and there is nothing contractually that binds me to a permanent shift. Therefore, I ask the Company to oblige my request to be relieved from working an all midnight (12—8 A.M.) shift.

RELIEF REQUESTED

This alleged discrimination was based on (check):

Race ☒ Color ☐ Religion ☐ National Origin ☐ Sex ☐ Age ☐ and is with regard to (check):

Initial Hiring ☐ Assignment ☒ Promotion-Up Grading ☐ Transfer ☐ Discharge ☐ Lay Off ☐ Recall ☐

* * * *

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1165
AFL CIO CLC

May 11, 1979

Mr. Frank Mont, Chairman
International Committee on Civil Rights
Five Gateway Center
Pittsburgh, PA 15222

RE: USWA Civil Rights Complaint—Paul E. Butcher dated 2/28/79

Dear Sir and Brother:

In reference to USWA Civil Rights Complaint form dated February 28, 1979 signed by Paul E. Butcher, ck. #6224, the Complaint has been settled to the satisfaction of all parties concerned in the Fourth Step of our Grievance Procedure (Grievance Number L-10932-9, April 24, 1979).

Copies of the Complaint and the settlement are attached.

Sincerely,

/s/ Thomas E. James
Thomas E. James, Chairman
Civil Rights Committee
USWA Local Union #1165

TEJ:nc
Enc.

UNION'S EXHIBIT 248

* * * *

October 30, 1970

CIVIL RIGHTS COMMITTEE MEETING

October 21, 1970 3:00-5:00 P.M.
Industrial Relations Conference Room

Personnel Present

Company Representatives	*Union Representatives*
James Mulligan, Chairman	Carl Cannon, Chairman
Thomas J. Ryan	Harry Cavuto
Paul Geiswite	James M. Quinn, Jr.
Norris J. Domanque	Alexander Musika
Leonard M. Eaton	James Robinson

The regular meeting of the Civil Rights Committee began promptly with the introduction of an agenda for discussion by Mr. Carl Cannon, the Union Chairman. The agenda contained four questions which are listed below with a synopsis of the discussion that followed each question.

Question One:

> "What are the Company's hiring practices for full time and summer employees?"

Mr. Norris Domangue stated that it is the company's policy to hire employees who, based on their physical and mental abilities, will best serve the interests of the company.

In the Bargaining Unit, all jobs above the pool level will be filled from the pool or from transfer requests, whenever possible. These openings are acted upon by the Personnel department when the concerned department submits a requisition for personnel replacement. For six

years, the company has endeavored to place Blacks in all White subdivisions.

Many factors are considered before selecting personnel for summer jobs including the need to hire minorities. This past summer, out of over 400 applications from college students, 107 Whites and 26 Blacks were hired to fill 116 Bargaining unit jobs and 17 salary jobs.

Question Two:

> "Why are there no Black employees in the Carpenter Shop and Blacksmith Shop when supervision in the Blacksmith Shop say they are in need of men?"

Mr. Ryan explained that there are no active requests for transfer to the Blacksmith Shop and that in 1966 the last person was hired in that department. Three men remain on recall.

In the Carpenter Shop there are 33 approved requests for transfer. One request is from a Black employee with a company hiring date of 1970 which makes him ineligible at this time for transfer. 1966 saw the last person hired in the Carpenter Shop.

Mr. Quinn asked how often may a person take the test for job transfer?

Mr. Domangue replied that there is no set time. The company does encourage employees to wait six months after taking a test before taking the same test again. A person is advised against taking the same test more than three times as it is questionable whether a fourth time will produce any significant change.

Question Three:

> "How are Foremen and General Foremen selected and evaluated? Do we have one standard throughout the Mill?"

Mr. Domangue explained that each department superintendent is called upon to select personnel for foremanship school from among the bargaining unit employees in that department. All available records are reviewed to determine if these employees have the necessary prerequisites to successfully complete the formanship school.

Mr. Cavuto and Mr. Quinn emphatically declared that they believed the tests were useless as an indicator of a man's ability to perform a foreman's job.

Mr. Domangue explained that there have been exceptions made in certain cases where individuals who did not pass the pre-foremanship tests were accepted for foremanship school based on their other documented qualifications.

Mr. Robinson stated that a senior employee who performs his job well should be given an opportunity to become a foreman.

Mr. Geisewite stated that the employee who performs his job well does not necessarily make a good foreman as many other factors must be considered.

Mr. Domangue went on to explain that individuals selected for foremanship school must possess the necessary skills and ability to handle the four weeks of school which includes public speaking, certain homework requirements and a considerable amount of outside reading.

In addition, the company is striving foremost, through its foremanship school, to develop a nucleus of foremen with the technical competence to be available for interdepartmental transfer. Lukens needs for the future include the flexibility to transfer foremen from one department to another when the workload in a particular department is such that additional supervision is required.

Individuals who are promoted to foreman, solely on the basis of their experience in a particular area, often do

not possess the flexibility or technical competence to accept a transfer to another department.

A discussion ensued where the company's philosophy and practice in promoting men to foreman and general foreman was discussed.

Mr. Mulligan, as chairman, reiterated the purpose of the Civil Rights Committee. He declared that promotions within the salary force at Lukens were not for the Committee to discuss. It was permissible to discuss foremanship training and the selection of turn foremen as it is an area where the Union and Company interface.

Question Four:

> "Would it be possible for this committee to get a breakdown of hiring by departments in bargaining and salaried units?"

Mr. Domangue provided a listing of bargaining unit employees by number in each subdivision with a breakdown by Black and White employees.

The Committee was asked to confirm the fact that at the meeting held on April 11, 1969 procedural matters for these meetings were established. It was agreed that the ground rules for discussion had been established with the exception of a submission time for agendas.

The next meeting of the Civil Rights Committee will be held on November 16, 1970, from 3:00 P.M. to 5:00 P.M. in the Industrial Relations Conference Room.

/s/ Leonard M. Eaton
LEONARD M. EATON
Secretary

* * * *

MINUTES
CIVIL RIGHTS COMMITTEE MEETING

May 31, 1978

LOCATION:

Strode Avenue Office Building
Conference Building

ATTENDEES:

Union Representatives	*Company Representatives*
T. James, Chairman	J. Slattery, Chairman
B. Pilotti	T. Ryan
J. Brown	N. Thompson

DISCUSSION:

1. The Union expressed concern that a disproportionate number of minority employees were possibly being discharged in the EMS area during their probationary periods. They also reminded the Company of the obligation to inform an employee of the reasons for discharge. The Company responded that supervision had been reminded of its obligation to provide a reason for discharge and would be reminded again if necessary. The Union agreed to provide statistics to substantuate its claim of disproportionate discharges at a subsequent meeting of the Committee.

2. With regard to the Civil Rights Complaint filed by Ms. Joan D. Hernandez, Mr. Slattery advised the Committee that the EEO office had investigated her complaint and had concluded that her termination was based on lack of skill and not sex. At the same time, Ms. Hernandez was terminated, a white male was also terminated. In addition, the EEO office interviewed other female employees in the same area.

The EEO office was advised by the interviewees that they had not been subjected to any discrimination or unfair treatment from other workers or supervision. The Union then requested that they be permitted to observe Ms. Hernandez on the job when employment is next increased in that area to see if she had or did not have the requisite skills. This request was denied as, in the Company's opinion, it exceeded the authority of this Committee.

3. The Committee discussed a possible joint letter from the Committee to Lukens to emphasize the importance of counseling during the probationary period. Mr. Slattery agreed to draft such a letter for consideration at a future meeting of the Committee.

The next meeting of the Committee will be June 21, 1978.

JAMES L. SLATTERY

* * * *

UNION'S EXHIBIT 261

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C.I.O., Local #1165

Number L-8810-10

Date 6/7/76

Rec'd By Joe Hess

Name: Group Check No.————

Address

Job———— Dept.: Machine & Forge

Div.: Machine Shop

Employee's Statement of Grievance

We, the undersigned, contend the Company has discriminated against us in the posting of the job in the Toolroom. The Company has denied us promotional opportunity and advancement to a better job.

We ask the Company to recognize our seniority and the original posting and pay all monetary losses from May 30, 1976.

/s/ George Dun 1511
/s/ Brett Peters 6095
Date June 3, 1976

First Step, Foreman's Answer:

Seniority was recognized, senior, qualified men were given the jobs on the posting.

Therefore grievance denied.

Settled ——— Appealed to Next Step ✓

/s/ R. Allen Mowbry /s/ Joseph Pudless

Date 6/7/76

Second Step Date rec'd by Sup't of Dept 6-10-76

At the Union's request, we have agreed to revert to the original posting, which will give the agrieved promotional opportunity, and the opportunity to take entrance level test.

Settled No Appeal to Next Step X

/s/ R. Allen Mowday /s/ [Illegible]
Date 6-10-76

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* * * *

3rd Step—L.U. #1165 June 15, 1976

Grievance L-8810-10—Group, Machine Shop—Rec. 6-3-76

> 'We, the undersigned, contend the Company has discriminated against us in the posting of the job in the Tool Room. The Company has denied us promotional opportunity and advancement to a better job.
>
> 'We ask the Company to recognize our seniority and the original posting and pay all monetary losses from May 30, 1976.'

UNION POSITION: The Union stated it is specifically objecting to the test being required of the grievants to enter the Tool Room. The Union stated that the Tool Room vacancy was initially filled by two older employees who were not required to take such a test. The Union stated that these two older employees now have asked that they be reassigned as 1/C Machinists and the Union does not think the Company has the right to use a different standard for selecting the grievants to fill the same vacancy off of the same posting. The Union noted that the grievants are black employees and the Union questioned whether this is the reason for requiring a test to enter

the Tool Room. The Union also stated that the Company is obligated to first train the grievants before administering a job related test.

COMPANY POSITION: The Company stated it is agreeable, in settlement of the instant grievance, to using the first posting rather than a second subsequent posting in filling the vacancies in the Tool Room. The Company acknowledged that the two oldest employees who signed the posting and entered the Tool Room have since requested that they be reassigned to 1/C Machinists. The Company stated that the grievants will be given the opportunity as the next most senior employees who signed the posting to qualify for the vacancies in the Tool Room. The Company stated that the test referred to by the Union is job related and administered for the purpose of determining that employees have the background to learn the Tool Room Attendant position. The Company stated there is no intent in administering the test to discriminate against black employees.

DISPOSITION: Appealed to Step 4.

[4th Step] [June 3, 1977]

* * * *

L8810—Withdraw

* * * *

UNION'S EXHIBIT 262

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C. I. O., Local #1165

Number L-8173-9

Date 11-19-75

Rec'd By J. Abrams

Name James Williams Check No. 6981

Address

Job Dept. Mech. Maint. Div. Maint.

Employee's Statement of Grievance

I, the undersigned, contend the Company discriminated against me because of my color by moving me from the Electric Melt Shop area, of which I have seniority over fellow employees in the same job description and the same ability, to the 84 Mechanical Maintenance area. I ask this to cease and to return me to my proper area at the Electric Melt Shop.

/s/ James Williams

Date Oct. 30, 1975

First Step, Foreman's Answer:

Jim Williams was relocated from the E.M.S. as a result of a reduction of manpower and his relative lack of floor experience. Since he does have a general knowledge

of the melt shop area he will be returning as soon as an opening developes.

Settled Yes Appealed to Next Step ———— —

/s/ Benjamin Pilotti /s/ J. C. Abrams

Date Dec. 9, 1975

UNION'S EXHIBIT 263

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C. I. O., Local #1165

Number L-8353-5

Date 2-2-76

Rec'd By T. Scull

Name Ronald Parr Check No. 5431

Address

Job Dept. 120' " Mill Div. Crane

Employee's Statement of Grievance

I, the undersigned, contend the Company is discriminating against me by putting a white man in a job that I bid on and secured. I ask the Company to cease and desist and to pay me all monetary losses.

THIS IS A CONTINOUS GRIEVANCE.

/s/ Ronald Parr

Date Jan. 30, 1976

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* * * *

3rd Step—L.U. #1165 February 24, 1976

Grievance L-8353-5—Ronald Parr #5431, Cranes—Rec. 2-2-76

'I, the undersigned, contend the Company is discriminating against me by putting a white man in a job that I bid on and secured.

I ask the Company to cease and desist and to pay me all monetary losses.[7]

THIS IS A CONTINUOUS GRIEVANCE.

UNION POSITION: None

COMPANY POSITION: None

DISPOSITION: Settled in 2nd Step.

UNION'S EXHIBIT 264

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C. I. O., Local #1165

Number L8873-8

Date

Rec'd By

Name Virginia Washington Check No. 1331

Address

Job Dept. HtTr. & Fin. Div. NAB

Employee's Statement of Grievance

I, the undersigned, contend the Company has unjustly been denying me the opportunity for promotional opportunity since 1975; therefore, charge the Company has been discriminating against me. I ask the Company to cease and desist, elevate me to my proper job, and pay me all monetary losses.

/s/ Virginia Washington

Date June 21, 1976

First Step, Foreman's Answer:

DENIED

(1) Vir. Washington signed posting for GA charger 5/29/75—put on learning 7/20/75-8/2/75. After 2 week period, she asked to be taken off job.

(2) Signed posting for layerant on 5/29/75—she was not put on learning that job nor was anyone else put on learning that job due to nonavailability of people to fill their would-be vacated positions at that time.

(3) 6/8/76—signed for NAB charger—she was 6th of 7 on seniority.

(4) 6/17/76—signed for NAB seale checker—she was 5th of 8 on seniority.

(5) 6/17/76—signed for NAB/GA furnace operator—she was 3rd of 7 on seniority.

Settled ————Appealed to Next Step Send 3rd step.

/s/ Thurman E. Jones /s/ Andrew B. Maloney
Date 7/1/76

3rd Step—L.U. #1165 July 20, 1976

Grievance L-8873-8—Virginia Washington #1331, NAB —Rec. 6-22-76

'I, the undersigned, contend the Company has unjustly been denying me the opportunity for promotional opportunity since 1975; therefore, charge the Company has been discriminating against me.

'I ask the Company to cease and desist, elevate me to my proper job, and pay me all monetary losses.'

UNION POSITION: The Union stated the grievant's specific complaint in the instant grievance is that she was improperly denied the opportunity to learn the job of Furnace Helper. The Union contended that the job of Furnace Helper was posted in March 1975 and the grievant signed the posting. The Union contended that despite the fact that the grievant signed the posting, a younger employee than the grievant named Weber was placed on the Furnace Helper position. The Union also noted that younger employees than the grievant had been hired to learn jobs that the grievant would like to learn in order to get off the job of test cutting. The Union also contended that in the assignment of newly hired

employees to learn entry level jobs, supervision has historically assigned minority employees to learn the least preferable of the entry level jobs. The Union presented a schedule dated June 20, 1976 as evidence of this fact.

COMPANY POSITION: Supervisor Moissey testified that to his knowledge the grievant never signed a posting for the job of Furnace Helper. Supervisor Moissey testified that the grievant signed the posting for Green Anneal Charger on May 29, 1975, but asked to be taken off the job after spending from July 20, 1975 through August 2, 1975 as a learner. Supervisor Moissey also stated that the grievant has signed the posting for Layer-out on May 29, 1975, but to date no one has been selected off the posting to learn the job. Mr. Moissey also testified that the grievant has signed a posting dated June 8, 1976 for NAB Charger, but was sixth of seven in seniority. Mr. Moissey stated furthermore that the grievant has signed postings for NAB Scales Checker and NAB Green Anneal Furnace Operator on June 16, 1976, but on both occasions did not have enough seniority to merit the job. Supervisor Moissey denied the Union's allegation that minority employees who are newly hired are assigned the least preferable entry level jobs. He stated that prior to hiring employees into entry level jobs, those jobs are posted in the department. The Company suggested the instant grievance be held in abeyance until the grievant returns from sick leave, at which time the parties can discuss with the grievant this specific complaint alluded to in the instant grievance.

DISPOSITION: Held in abeyance.

Step 4—L.U. #1165 November 10, 1976

Grievance L-8873-8—Virginia Washington #1331, NAB —Rec. 6-22-76

> 'I, the undersigned, contend the Company has unjustly been denying me the opportunity for promo-

tional opportunity since 1975; therefore, charge the Company has been discriminating against me.

'I ask the Company to cease and desist, elevate me to my proper job, and pay me all monetary losses.'

UNION POSITION: The Union stated if the grievant did, in fact, bid the job, she should be given due consideration. The Union stated, however, that the grievant has recently quit the employ of the Company. The Union stated, however, its position in the instant grievance is that the Company should not discriminate against any black or female employees.

COMPANY POSITION: The Company stated its position is the same as that in the Step 3 minutes. The Company stated it agrees with the Union's position that there should be no discrimination against any black or female employees. The Company stated that in the instant grievance there was no such discrimination.

DISPOSITION: Withdrawn without precedent or prejudice on the basis of the Company's position.

UNIONS' EXHIBIT 266

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C.I.O., Local #1165

Number L-7422-9

Date 10-23-74

Rec'd By P.T. Scull

Name Israel Grove Check No. 4472

Address

Job ——— Dept. Ref. & Fuel Div. Bricklaying

Employee's Statemen of Grievance

I, the undersigned, contend the Company violated the current Labor Agreement by denying me the opportunity to become 3rd Class Bricklayer.

I ask the Company to cease and desist in this practice and to pay me all monetary losses.

/s/ Israel Grove

Date Oct. 22, 1974

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* * * *

3rd Step—L.U.#1165 November 26, 1974

Grievance L-7422-9—Israel Grove, #4472, Masonry, Ref. & Fuel—Rec. 10-23-74

"I, the undersigned, contend the Company violated the current Labor Agreement by denying me the opportunity to become 3rd Class Bricklayer.

"I ask the Company to cease and desist in this practice and to pay me all monetary losses."

* * * *

UNION POSITION: None.

COMPANY POSITION: None.

DIPOSITION: Held in abeyance.

3rd Step—L.U.#1165 December 17, 1974

Grievance L-7422-9—Israel Grove, #4472, Masonry, Ref. & Fuel—Rec. 10-23-74

"I, the undersigned, contend the Company violated the current Labor Agreement by denying me the opportunity to become 3rd Class Bricklayer.

"I ask the Company to cease and desist in this practice and to pay me all monetary losses."

UNION POSITION: The Union stated the Company failed to counsel Mr. Grove as to why he failed the overall test for "C" Bricklayer which is covered under the current Labor Agreement. The Union stated that Mr. Grove should be transferred to the position and he should remain there until he becomes a craftsman, which is similar to the way it is done in the Pipe Shop.

COMPANY POSITION: The Company stated the instant grievance is covered by Grievance L-6614 which was heard in the 4th Step on September 18, 1974 at which time it was denied by the Company. The Company stated that on July 28, 1974 it created the position of Helper in order to train persons for the 3/C Bricklayer position. The Company stated that Mr. Grove has not availed himself of that opportunity. The Company stated the job was posted and that Mr. Grove did not sign the posting. The Company stated that other employees who

had signed the posting were placed in the Helper position and are now working as 3/C Bricklayers.

DISPOSITION: The Union will make a written reply to the Company within ten (10) days in accordance with the terms of the current Labor Agreement.

Step 4—L.U.#1165 May 21, 1975

Grievance L-7422-9—Israel Grove, #4472, Masonry, Ref. & Fuel—Rec. 10-23-74

> 'I, the undersigned, contend the Company violated the current Labor Agreement by denying me the opportunity to become 3rd Class Bricklayer.
>
> 'I ask the Company to cease and desist in this practice and to pay me all monetary losses.'

UNION POSITION: The Union stated it is adding to its previously stated position the charge of discrimination. The Union requested that the Company reply to the Union in a manner which will indicate the number of minority employees who are Bricklayers.

COMPANY POSITION: The Company stated that it will respond as requested.

DISPOSITION: Prior to July 1974, the Company had three black Bricklayers, two of whom had been promoted to foremen. There were also 23 white Bricklayers prior to the same date. In July 1974, the Company created the position of Helper in the Masonry Subdivision. This new position helped employees to learn bricklaying. The record indicates that 12 employees took advantage of the opportunity to advance to Bricklayer 'C'—five black employees passed the test—five white employees also passed and two black employees declined the test. In view of the forgoing, the Company denies there has been any discrimination of black employees as charged by the Union in the above grievance.

STEP 4½ GRIEVANCE MEETING
LOCAL UNION #1165

May 19, 1976—9:00 a.m.-12:00 Noon
Industrial Relations Conference Room

Representing Company

T. J. Ryan
P. T. Scull

Representing Union

Earl Zitarelli
James Brown
Benjamin Pilotti
George Barrage
Benjamin Elliott
Therman Gaines
Albert Cooper

It was agreed by the parties that any cases resolved in this Step 4½ Meeting would be done so on a non-precedent basis and will not be referred to in discussions before a third party.

Withdrawn— * * * * L-7422-9

* * * *

/s/ T. J. Ryan
T. J. RYAN
Labor Relations

EARL ZITARELLI
Staff Rep.
United Steelworkers of America

UNION'S EXHIBIT 268

LUKENS STEEL COMPANY
UNITED STEELWORKERS OF AMERICA
C.I.O., LOCAL #1165

Number L10831-10

Date 1-16-79

Rec'd By ————

Name George A. Dixon Check No 1516

Job ——— Dept. Mach. & Forge Div. Machine Shop

Employee's Statement of Grievance

I, the undersigned, contend the Company violated the current Labor Agreement and has shown discrimination when they denied me the job of Welder in the Machine Shop.

I ask the Company to reinstate me to the job of Welder and to pay me all monetary losses for this violation.

/s/ George Dixon

Date Jan. 10, 1979

First Step, Foreman's Answer: There was no discrimination shown, and the Company can see no violation in the current labor agreement. Therefore, this grievance is denied.

Settled ———— Appealed to Next Step ✔

Signed [Illegible] (union) Signed ———— (foreman) Date 1/15/77

* * * *

3rd Step—L.U.#1165 March 13, 1979

Grievance L-10831-10—George A. Dixon #1516, Machine Shop—rec. 1-10-79

I, the undersigned, contend the Company violated the current Labor Agreement and has shown discrimination when they denied me the job of Welder in the Machine Shop.

I ask the Company to reinstate me to the job of Welder and to pay me all monetary losses for this violation.

UNION POSITION: The Union contends the Company has discriminated against the grievant by denying him the job of Welder in the Machine Shop. The Union stated the grievant was a successful bidder for the job and was sent to Welded Products for the required welding test. The Union stated the grievant passed the welding test. The Union stated that Foreman Stanley Dero had indicated he would give the grievant four days to become familiar with the work. The Union stated that after two and one-half days, the Company had their Welding Engineer check the work of the grievant. The Union stated they feel the grievant did not get a fair share of proper training. The Union stated that other Welders have done as bad as the grievant. The Union stated that if the grievant had been given more time, he could have become a more proficient Welder.

COMPANY POSITION: The Company stated they posted for a position of 'B' Welder and that George Dixon became the successful bidder. The Company stated that Mr. Dixon was sent to Welded Products for the SAE Welding Test and was passed. The Company stated Mr. Dixon was assigned to weld on a table roll and an edger shaft. The Company stated they had the work checked by Welding Engineer T. McKearney. The Company stated the work checked on the table roll had a poor tie

in at the start and stop of the weld and this results from a lack of technique. The Company stated the check on the edger shaft revealed a poor bead tie in which represents a lack of technique and excessive splatter which is caused by either excessive amperage and/or long arc lengths. The Company stated that all the work had to be reworked. The Company stated Mr. Dixon lacks the necessary experience in this type of welding.

DISPOSITION: Since the instant 3rd Step meeting, the Company has made a further review of the facts involved in this grievance and must continue to deny the request of the Union.

UNION'S EXHIBIT 276

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C.I.O., Local #1165

Number L 4504

Date 2/13/70

Rec'd By J. Miller

Name Albert Lewis Check No. ————

Address

Job ———— Dept. Trans. & Serv. Div. [Illegible]

Employee's Statement of Grievance

I, the undersigned, claim that the Company has discriminated against me regarding tests given to me for the position of truck driver.

I request that I be awarded the bid and placed in the correct position on the seniority list.

/s/ Albert Lewis
Date Feb. 13, 1970

First Step, Foreman's Answer:

We contend there is no violation of current labor agreement, therefore this Grievance is denied.
Settled ——— Appealed to Next Step directly to 3rd step

/s/ James Brown
Union

/s/ John Miller
Foreman
Date 2-16-70

Grievance L-4504—Albert Lewis, Check # 6334, Motor Trucks, Sub., Trans. & Services Dept.—Rec. 2-13-70

> "I, the undersigned, claim that the Company has discriminated against me regarding tests given to me for the position of truck driver.
>
> "I request that I be awarded the bid and placed in the correct position on the seniority list."

UNION POSITION: The Union objected to the Company testing employees prior to entering into the Truck Subdivision without previous training. The Union stated that in the instant grievance, the grievant feels that the test was improperly administered. The Union charged that the test is not uniform and there are no guidelines. The Union also charged that certain employees have been admitted to the Truck Subdivision without previous experience and without taking a test. The Union stated that it is asking in the instant grievance that the grievant be re-tested in the presence of a Union representative.

COMPANY POSITION: The Company stated as regards the test in general that it is certainly job-related and permissible under the provisions of the current Labor Agreement. The Company pointed out that the test is merely one prerequisite in determining an employee's qualifications for employment in the Truck Subdivision. The Company stated that it requires a certain amount of experience as a prerequisite to entrance into the Truck Subdivision. The Company stated that the test referred to by the Union in the instant grievance is a measure of such experience. The Company stated, however, that should an employee meet the prerequisite relative to truck experience, he would still be judged on other facets involved in truck driving during his first 60 days of employment in the Truck Subdivision. The Company stated,

however, that it is willing to readminister the test as regards the grievant, Albert Lewis, in the presence of a Union Shop Steward and settlement of the instant grievance.

DISPOSITION: Held in abeyance pending retest.

April 6, 1970

P. T. Scull, Assistant
Manager-Labor Relations
Lukens Steel Company
Coatesville, Pa. 19320

RE: Grievance L-4504

Dear Mr. Scull:

Since the Company complied with the disposition as agreed to in the 3rd Step, we are withdrawing the above grievance without prejudice.

Very truly yours,

MICHAEL REACH, Chairman
Grievance Committee

MR:nc

UNION'S EXHIBIT 289

Arbitration

(Grievance L-6097-10)

Hearing date: May 10, 1973

LUKENS STEEL COMPANY

— and —

UNITED STEELWORKERS OF AMERICA,
AFL-CIO LOCALS 1165 AND 2295

APPEARANCES: *For the Company*—T. J. Ryan, Manager, Labor Relations; P. T. Scull, Assistant to Manager, Labor Relations

For the Union—Earl J. Zitarelli, Staff Representative; Harry Cavuto, President, Local 1165

OPINION

The contention here is that supervision improperly assigned a Shop Electrician from Motor Repair work to Small Item Repair work in the Electric Shop, causing him a loss in earnings opportunities.

In the earlier stages of the grievance, the Union was arguing that Article V, Section 3(F) was violated, but at the Fourth Step and at the arbitration hearing, the Union spokesman dropped that argument and placed his main reliance on Article IV (Wages), and particularly on the first paragraph of Article XI (B), which reads as follows:

> "The parties recognize that promotional opportunity and job security in event of promotions, decrease of forces and rehiring after layoffs should increase in proportion to length of continuous service, and that in the administration of this Article the intent will be that wherever practicable full consideration shall be given continuous service and seniority in such cases."

It is conceded that the incentive earnings on the Small Item Repair work average substantially less than those on the Motor Repair work, and the Union asserts that the Motor Repair work assignments therefore constitute a "promotional opportunity" within the meaning of this paragraph. The grievant, Stanley Graden, had more seniority than two other Shop Electricians who were kept on the MR work, and it is argued that Article XI (B) was thereby violated.

The Company contends that the concept of "promotional opportunity" refers only to promotions to higher-rated jobs, and has never been treated in this Company as applying to work assignments within the same job classification. Furthermore, the Company asserts that "promotions" have always been treated as limited to *permanent* moves, not merely temporary assignments. In support of this last contention, the Company has submitted a 1969 decision by Arbitrator Eli Rock, denying Grievance No. L-3593. In that case, Arbitrator Rock ruled that an assignment of a junior Electrician A to a temporary Gang Leader vacancy was not violative of Article XI (B), since the "promotional opportunity" specified therein did not encompass assignments to temporary vacancies. (He found that this principle had been firmly established in a much earlier arbitration decision under this same contract language, a 1949 decision on Grievance L-692 by Arbitrator Kendall D'Andrade.)

The Union spokesman contended that the Rock and D'Andrade decisions are not controlling here because the assignment in the present case has all the earmarks of permanence, the grievant *still* being on the Small Items Repair work, six months after the initital assignment which brought on the grievance. I find it unnecessary to rule on the interesting question of whether the prior rulings would govern a "temporary" assignment lasting as long as six months, however, because I think the grievance must be denied in any event on the other issue presented, concerning the fact that these were assignments within the same classification.

On *that* issue, I find that the Company is on solid ground on the basis of the evidence regarding past practice. The Union has not challenged the Company's assertion that assignments within the classification have regularly been made without regard to seniority—they simply say this case is unique in that it involves two separate incentive plans within the same classification, with substantially different earnings opportunities. In answer to that, however, the Company produced the record of an earlier grievance (L-4873), filed in December 1970 by three of the Shop Electricians in this same Electric Shop, including the present grievant, complaining of exactly the same kind of assignment as the one at issue here—to Small Item Repairs instead of Motor Repairs. The Union contended that senior men should have preference on the Motor Repair work, because of the higher earnings opportunity, while the Company contended that it "has the right of assignment within a classification".

The grievance was withdrawn at the Fourth Step, without prejudice, and the minutes indicate that perhaps the issue was beclouded by claims that the employees had been rotated and that earnings on Small Items work were, at that particular time, higher than on Motor Repair. The Union spokesman at the present hearing asserted that these circumstances made the case worth-

less as a precedent, and I am inclined to agree with him. However, it *does* show that the Company has been consistent in its position over the years that this type of assignment, within a classification, is not governed by seniority, and there is no evidence that this proposition has been successfully challenged.

On all the evidence before me, I conclude that the assignment in question here was not a "promotional opportunity" within the meaning of Article XI (B), that no other provision of the contract was violated by the assignment, and that the grievance should be denied.

DECISION

Grievance L-6097-10 is denied.

/s/ Lewis M. Gill
LEWIS M. GILL
Umpire

May 17, 1973

UNION'S EXHIBIT 302

LUKENS STEEL COMPANY
UNITED STEELWORKERS OF AMERICA
C.I.O., LOCAL #1165

Number L-11459-6

Date 7-23-79

Rec'd By W. Whiteman

Name Kenneth J. Russell Check No. #1841

Job ———— Dept. Melting Div. ESR

Employee's Statement of Grievance

I, the undersigned, contend the Company violated APPENDICES D and E of the current Labor Agreement by denying me the opportunity to work as an Apprentice in the Electrical Department.

I ask the Company to cease and desist and to allow me to enter the program and pay me all monetary losses if there are any.

/s/ Kenneth J. Russell
Date July 23, 1979

First Step, Foreman's Answer: To 3rd Step

* * * *

3rd Step—L.U.#1165 September 18, 1979

Grievance L-11454-6—Calvin C. Cox #2083, ESR—rec. 7-23-79

Grievance L-11458-6—Guy G. Ball #1960, ESR—rec. 7-23-79

Grievance L-11459-6—Kenneth J. Russell #1841, ESR—rec. 7-23-79

I, the undersigned, contend the Company violated APPENDICES D and E of the current Labor Agreement by denying me the opportunity to work as an Apprentice in the Electrical Department.

I ask the Company to cease and desist and to allow me to enter the program and pay me all monetary losses if there are any.

UNION POSITION: The Union contends the Company violated Appendices D and E of the current Labor Agreement by denying the grievants the opportunity to work as an apprentice in the Electrical Department. The Union requested that their Staff Representative be permitted to review the Apprenticeship Test.

COMPANY POSITION: The Company stated the grievants failed to pass the Apprenticeship Test and therefore are not qualified to enter the Apprenticeship Program. The Company stated that in accordance with the Labor Agreement the Company will select apprentices from applicants for the Apprenticeship Training Program who are qualified to enter such program. The Company stated that the principle criteria to be used in making the selection are whether the applicant has the ability to absorb the training of the program specifically related to the craft involved and the physical ability to perform the duties of the craft involved. The Company stated the entire program was discussed in a meeting attended by Messrs. Ryan, Santoro, Pilotti and Wills and no questions were raised at that time.

DISPOSITION: Appealed to 4th Step.

UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC
Five Gateway Center, Pittsburgh, Pa. 15222

February 20, 1980

Mr. C. G. Mahairas
Manager—Labor Relations
Lukens Steel Company
Coatesville, Pennsylvania 19320

Re: Gr. Nos. L-11454-6,
L-11458-6 and
L-11459-6

Dear Mr. Mahairas:

The following is a list containing information needed by the Union to properly review the testing involved in the above-cited grievances concerning the selection of employees for apprentice vacancies in the Electrical Department at Lukens Steel Company.

(1) a copy of the test for the grievants and awardees;

(2) a copy of the manual and administrative instructions used for each of the tests;

(3) the method of scoring for the test and correct scoring keys;

(4) the cutoff or passing score for each of the tests and a copy of the study used to substantiate the cutoff or passing score for each of the tests;

(5) complete validation data for each of the tests and any other information which the Company relies on in its allegation that the tests are job related;

(6) detailed job performance requirements as well as complete job analysis data;

(7) all relevant materials and data pertaining to the core program (same as those materials cited above in items 1-6 pertaining to entrance requirements);

(8) the names and seniority dates of any employees who took the tests and had greater seniority than the awardees;

(9) at what point in time were the tests first utilized for the job in the instant grievance;

(10) what factors, if any, did the Company utilize in its selection process other than seniority and the test scores (if the Company alleges determination was made based on relative ability, please explicitly delineate basis); and

(11) upon what specific factors the successful bidder was selected and upon what factors grievant was disqualified.

All such tests and materials will be held in strictest confidence and will not be copied or disclosed to any other person; provided that such tests and materials may be disclosed to an expert in the testing field for the purpose of preparation of the Union's position in the grievance procedure and to an arbitrator, if the case proceeds to that step. All tests and materials will be returned to the Company following resolution of the dispute.

All of the above material should be sent to my attention. If you have any questions, please feel free to contact me.

Very truly yours,

/s/ Patti Seehafer
Patti Seehafer, Representative
Arbitration Department

PS/ab
cc: Dee W. Gilliam, Director
Samuel Santoro, Staff Representative

UNION'S EXHIBIT 321

LIST OF SHOP STEWARDS, PAST & PRESENT,
FROM 1967 FOR L.U. #1165

Color	Name	Color	Name
White	Horace Adams	White	Howard W. Brown
White	William Alderman	White	Norman R. Brown
Black	Stanley R. Alston	White	Ronald E. Brown
White	Donald L. Ammon	Black	Samuel H. Brown, Jr.
White	Robert Amole	Black	Harry D. Butcher
Black	James L. Anderson	White	Phillip Byers
White	James R. Anderson	Black	William Calloway, Jr.
White	Wilson E. Armentrout	White	Robert J. Came
White	Wilson E. Armentrout, Jr.	Black	James Campbell
		Black	Haywood Cannon
Black	Robert Austin	Black	Alfred S. Carey
White	Everett Bailey	White	Andrew Caridi
White	Nathan T. Bair	Black	John V. Carr
White	Norman E. Baker	White	Charles A. Cazille
White	Dale A. Baker	White	John Chamberlain
White	George Barber	Black	Ernest Chapman
White	Chester E. Barnes	White	Gene W. Chesnet
Black	Andrew B. Barnett	White	Larry L. Clevenstine
White	Harry E. Barrage	White	Robert Coffey
White	Howard L. Barton	White	Robert S. Clevenstine
Black	James N. Baxter	White	John W. Coldren
Black	John L. Baxter	White	Carl W. Cook
White	David L. Baldwin, Jr.	White	Carl Cozzone
Black	Robert J. Baynard	White	Joseph J. Cozzone, Jr.
White	Robert A. Beaver	White	Robert L. Cornett
White	Andrew Bedrick	White	Calvin C. Cox
White	Leon Bembenek	White	Granville Crothers
White	Martin Bendas	Black	William R. Culclasure
White	Henry Berardi	White	William Daily
White	Lincoln H. Blackwell	White	John H. Dale
Black	Charles E. Boddy	White	George R. Daniels, Jr.
White	Stephen Bodner	White	Charles T. Davidson
White	Donald D. Book	White	George H. Davidson
White	John Boros	Black	Leroy Davis, Jr.
Black	James R. Bowens	Black	Leroy Davis, Sr.
Black	Charles Boyd	White	William F. Davis
Black	William L. Boynes	White	Avory R. DeBoard, Jr.
White	Lewis H. Branson, Jr.	White	Clyde J. Deck
Black	James Brewer	White	Lorne T. Dell
White	Fred Broomell, Jr.	White	John A. DeMatteo
White	Carl L. Brown	White	Arthur Denithorne
Black	Herbert A. Brown	White	Joseph Dennis

Color	Name
White	Nicholas M. DePedro
White	Howard D. DeVault
White	David C. Dickens
White	Kenneth Dickey
White	Anthony DiObilda
White	Frank L. DiObilda
White	William DiObilda
White	Norman Disento
Black	Elwood Dixon
Black	Harvey I. Dixon, Jr.
White	Nicholas N. Dmytryk
White	Ray H. Doan
White	Chester A. Danato
White	Albert Donafrio
Black	Sharman E. Dorsey
White	Dennis Dougherty
White	John M. Duff
White	Charles R. Dunfee
Black	Benjamin J. Elliott
White	John J. Fallon, Jr.
White	Warren K. Farris
White	William R. Feaster
Black	Lawrence M. Ferguson
White	James E. Fiore
White	R. James Fisher, Jr.
Black	William E. Ford
White	Joseph Forte
Black	McDowell Fortune, Jr.
Black	Odell Footer
White	Anthony Frederick
White	John C. Frye
White	Albert D. Fuller
White	Donald R. Fuller
Black	Therman R. Gaines
White	Marvin H. Garnett
White	Louis R. Garver
White	Joseph Gavrish
White	John Gay, Jr.
Black	Donald Gerald
White	Lawrence N. Gill
White	William T. Glenn
Spanish	Benjamin R. Gomez
White	Robert D. Gouldner
Black	Robert Lee Gray
Black	Aubrey Greenley
White	Edward Graziul
White	Lawrence J. Gregor
White	Paul J. Gregor
White	David V. Grevin
Black	James Grove
Black	Moses Grove
White	Joseph A. Guldan
White	Harry D. Guringo, Jr.
White	William L. Haines, Sr.
White	Edgar Halterman
White	Howard Hanna
White	William E. Hanna
White	John Hano
White	Alman L. Harper
Black	George H. Horris
Black	George H. Hovelow, Jr.
White	Paul L. Helm
Black	Robert Henderson
Black	Issac Z. Henry, Jr.
Black	Fredrick Hicks
White	Roston W. Hicks
White	Harold K. Hess, Jr.
White	David L. Higginbotham
Black	Roger Paul Hill
Black	James E. Hines
White	Walter Hinton
White	J. Raymond Hirst, Jr.
Black	Charles Hogan
White	Bobby Gene Houston
White	Casper S. Hracho
Black	Lawrence Hubert
White	James Hudock
White	Clarence R. Hughes
White	Clayton E. Hughes
White	Calvin H. Hutzler, Jr.
White	Robert L. Huyard
White	Albert P. Imhoff
Black	Harold B. Irons
Black	Druis B. Irwin
White	Roy Issacs
Black	Richard Jacks
Black	Thomas E. James
White	William B. Jennings
Black	Earl S. Johnson
White	Gerald Johnson
Black	Isiah I. Johnson
White	Robert H. Johnson
Black	Rogers Johnson
White	Samuel W. Johnson
Black	William Johnson

Color	Name	Color	Name
Black	Willie Johnson	White	Harry Manley
White	Andrew C. Jones	White	Richard A. Mann
Black	Monroe W. Jones	White	Wilson A. Mann, Jr.
White	Norman Jones	White	Thomas Mariano
White	Peter A. Karshalis	White	Orlando Marino
White	Edward A. Kasian	Black	Joseph K. Martin
White	Paul E. Kauffman, Jr.	White	Frank L. Matejkovic
White	Joseph Kelnock	White	Charles S. Mattson
White	Robert B. Kennedy, Jr.	White	William B. Mattson
White	Michael J. Keretzman, III	Black	Edward Maye
		White	Norman McCarraher
Black	Eugene H. Kidd	White	Ronald McCarraher
White	Anna B. Kimes	White	Raymond R. McComsey, Jr.
White	Arthur L. King		
Black	John T. King	White	Garry W. McEldorney
White	Norman B. Kochel	Black	Larry D. McGibboney
White	Louis S. Kornet	White	Gerald C. McHenry
White	Eugene Kuch	White	Howard A. McLean, Jr.
White	Jere T. Kuhns	White	Charles McNutt
White	Randall E. Krammes	White	Richard D. McPeak
White	Joseph S. Kusnerzyk	White	Ira C. McWilliams, Jr.
Black	Wert Lacy	White	William (Wooyl) Melnick
White	Nicholas Laurento Douglas Lamb	Black	Ramon Middleton
		White	Donald Miley
White	Anthony P. Laurento	Black	Horace W. Miller
Black	Defields Lawrence	Black	William B. Miller
White	Earl Lawrence	White	Earl Millward
White	Elwood H. Lees	Spanish	Ruben Morales
White	Paul L. Leslie, Jr.	White	Charles I. Mock
Black	Albert S. Lewis	White	Harold Moore
Black	James Lewis	White	Lester R. Moore
White	John Lewis	Black	Louis D. Moore
White	Clayton Light	Black	Clarence Morris
White	Paul R. Linderman	White	Walter F. Morris
White	Dale G. Livingston	Black	Kenney Morrison
White	Domenick W. Lombardo	Black	Rayford Moulden
Black	Larry London	White	Dennis L. Mowday
White	Clarence W. Lowry	White	Ernest Mowday
Black	William Luby	White	Thomas A. Mowday
White	Don Lucas	White	Robt. Allen Mowday
Black	Lamar Lumpkin, Jr.	White	Ronald Mulcahy
White	John E. Lyons	Black	Charles Murray
White	Louis J. Maco	Black	Ralph R. Murray
White	Albert A. Mammarella	White	William Myers
White	Joseph V. Mammarella	Black	Calvin A. Murrey
White	Nicholas Mammarella	White	Alexander Musika
White	Joseph Mankow		

Color	Name
White	James W. Myron
* * *	
White	Fred Shaver
White	John M. Shesko
White	William Shickley
White	Norris J. Shirk
White	Robert Showalter
White	Charles Sill
White	John F. Skiba
White	Charles E. Smith
White	Donald W. Smith
White	Donald Y. Smith
White	Earl F. Smith, Jr.
Black	Earvin J. Smith
White	Guy R. Smith, Jr.
Black	Issac W. Smith
White	Barry E. Snyder
White	Roman Sobczynski
White	Donald Sokso
White	Mike J. Soroka
Black	Harry Spencer
White	Raymond H. Stackhouse
White	Raymond H. Stackhouse, Jr.
White	Theodore Stetler
White	Paul Stoltzfus
White	Steve Sushinski
White	Kenneth Swinehart
White	Leroy W. Swoyer
White	Delano Taylor
White	Eugene L. Taylor
Black	Raymond Taylor
Black	Robert J. Taylor
White	Robert W. Taylor
White	Joseph A. Thomas
Black	Cornelius E. Thorpe
White	Samuel W. Tomlinson
Black	Arthur H. Tooles
White	Raymond Townsend
White	Paul E. Trace
Black	Waddell T. Tucker
White	Benjamin Umile
White	Thomas B. Umile
White	Walter J. Urban
White	Wm. Larry Urbine
White	Morris J. Verbiski, Jr.
White	James F. Villbrandt
White	Edward Waddell
White	William Wallace
White	Robert T. Warden
White	Charles A. Warmiak
White	Kenneth H. Weaver
White	John F. Watts
White	Albert C. Welsh, Jr.
Black	Leon Whitfield
Black	Isaac D. Whitaker
White	Richard Whiteman
Black	David E. Williams
Black	James Williams
White	Robert A. Williams
White	Howard S. Wilson
White	Lewis L. Wilson
White	Robert F. Wilson, Jr.
White	Thomas G. Wilson
White	Rudolph Winchester, Jr.
White	Martin L. Wolfe
White	Bernard Williams
White	Lewis L. Wilson
White	Craig Woodruff
White	Edward D. Wright
White	Howard Wright
White	John Wright
White	Harold L. Yost
White	Bruce A. Young
White	Russel A. Yunkin
White	Guy Zazzara, Sr.
White	Michael Zevtchin
White	John Zamolski
White	David E. Zink
White	Joseph Zydinsky
Black	Thomas A. Brown, Jr.
White	Horace DiDavide
White	John H. Callahan
White	William J. Chesnet
White	Robert W. Froelich, Jr.
White	Benjamin J. Fuller
White	Allen L. Linderman
White	Lawrence D. March
White	Joseph F. Misiewicz
White	Daniel Profeto
White	John Przychodzien, Jr.

UNION'S EXHIBIT 322

SHOP STEWARDS FOR L.U. #1165
AS OF JAN. 23, 1979

ZONE #1—RAY GARDNER (Committeeman)
WADDELL T. TUCKER (Assistant)

David L. Baldwin, Jr. W
Thomas A. Brown, Jr. B
Robert L. Cornett W
Joseph Dennis W
John M. Duff, Jr. W
Edward Graziul W
Paul J. Gregor W
William L. Haines, Sr. W
Fredrick Hicks B
Anna B. Kimes W
John E. Lyons W
Edward Mayo B
Joseph F. Misiewicz W
Louis D. Moore B
Edward Pacana W
Rudolph Winchester, Jr. W

ZONE #2—ALBERT WELCH, JR. (Committeeman)
HAROLD L. YOST (Assistant)

William L. Boynes B
Robert Coffey W
Howard O. DeVault W
Donald R. Fuller W
Moses Grove B
David L. Higginbotham W
Clarence R. Hughes W
Jere T. Kuhns W
Larry London B
William Luby B
Ronald McCarraher W
Dennis L. Mowday W

Patrick J. Nolan W
Joseph H. Pajrowski W
William Shickley W
Raymond Townsend W

ZONE #3—ALBERT DePEDRO (Committeeman)
LOUIS J. MACO (Assistant)

William J. Chesnet W
Joseph A. Guldan W
Samuel W. Johnson W
Eugene H. Kidd B
Horace W. Miller B
Robert K. Patton, Jr. W
Robert G. Pratt W
Earvin J. Smith B

ZONE #4—ALBERT COOPER (Committeeman)
GEORGE WARIHAY (Assistant)

Andrew Bedrick W
Joseph Forte W
Paul L. Leslie, Jr. W
Stephen Shemonski W
Arthur H. Tooles B

ZONE #5—GEORGE BARRAGE (Committeeman)
GEORGE HAVELOW, JR. (Assistant)

McDowell Fortune, Jr. B
Benjamin J. Fuller W
Lawrence J. Gregor W
Isaac Z. Henry, Jr. B
Allen L. Linderman W
Defields Lawrence B
Lawrence O. March W
Richard D. McPeak W
Calvin A. Murrey B
William C. Sharp W
Raymond H. Stackhouse W

Paul Stoltzfus W
Morris J. Verbiski, Jr. W
Craig Woodruff W
John Wright B
Bruce A. Young W

ZONE #6—RICHARD JACKS (Committeeman)
STEPHEN BODNAR (Assistant)

Wilson E. Armentrout, Jr. W
Henry Berardi W
Gene W. Chesnet W
Calvin C. Cox W
Lorne T. Dell W
Horace DiDavide W
Anthony Frederick W
Aubrey Greenley B
George H. Harris B
James E. Hines B
Rogers Johnson B
Nicholas Laurento W
Albert S. Lewis B
James Lewis B
Albert A. Mammarella W
Ramon Middleton B
Ruben Morales Sp.
Stanley Przychodzien W
Justine D. Romandino W
Bruce Rutledge W
Earl F. Smith, Jr. W
Isaac W. Smith B
Donald Sokso W
Edward Waddell W
Charles A. Warmiak W
Howard S. Wilson W

UNION'S EXHIBIT 342

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C.I.O., Local #1165

Number L-4529

Date 3-11-70

Rec'd By T. J. Ryan

Name Local Union #1165 Check No.

Address

Job Dept. Melting Div.

Employee's Statement of Grievance

We, the Local Union, claim the Company violated the Testing provisions of our Current Labor Agreement in qualifying employees for the Con-Cast positions. We ask the Company to cease and desist in this practice and abide by our agreement.

/s/ ——— Date March 12, 1970

First Step, Foreman's Answer: Directly to 4th Step.

* * * * *

Grievance L-4529—Local Union #1165, Melting Dept.—Rec. 3-11-70

4th Step 3-25-70

"We, the Local Union, claim the Company violated the Testing provisions of our current Labor Agreement in qualifying employees for the Con-Cast positions.

"We ask the Company to cease and desist in this practice and abide by our agreement."

UNION POSITION: The Union stated that its position in the instant grievance is based on the letter from Ben Fisher which indicates that the test is not by any stretch of the imagination job related in accordance with the provisions of the current Labor Agreement. The Union charged that the test is in violation of Article XI, Paragraph L and Appendix E and Appendix F of the current Labor Agreement. The Union stated that job related implies that the test must be directly related to actual requirements on the job.

COMPANY POSITION: The Company stated that it used the PAQ to develop tests and points out that the PAQ was also used at Armco and Inland Steel Companies. The Company stated that it feels the test is job related and does not ask knowledge necessary on the job. The Company also questioned Mr. Fisher's objection to a written form of test, pointing out that Appendix E defines a job-related test as either written or in the form of an actual work demonstration which measures whether an employee satisfactorily meets the requirements of the job, including the ability to absorb any training which may necessarily be provided for that job. The Company stated that the Union's position seems to indicate that the test itself cannot be administered anywhere than on the actual job site or it would not be job-related.

DISPOSITION: Since the 4th Step meeting of March 25, 1970, the Company has made a further review of the facts involved in this grievance and must continue to deny the request of the Union. The Company contends that the tests given measure the ability to absorb such training for the job as is to be offered and is necessary to enable the employee to perform the job satisfactorily. The Company feels that the tests are in accordance with the provisions of Article XI, Paragraph L, and Appendix E of the current Labor Agreement. The Company

does not feel that Appendix F is applicable in the instant grievance since Trade and Craft jobs are not involved.

* * * *

Final Settlement: Withdrawn without precedent or prejudice.

Date of Settlement 2-3-71

UNITED STEELWORKERS OF AMERICA
District Seven
Downingtown Savings & Loan Co.
100 E. Lancaster Avenue
Downingtown, Pa., 19335
Telephone: 1-269-8300

May 6, 1970

Mr. T. J. Ryan
Manager, Labor Relations
Lukens Steel Company
Coatesville, Pa. 19320

Dear Mr. Ryan:

The following cases are being appealed to Arbitration:

* * * *

L-4529

* * * *

Very truly yours,

/s/ Mike Gaspich
Mike Gaspich
Staff Representative

MG:mad

LUKENS STEEL COMPANY
Coatesville, Pennsylvania 19320

June 2, 1971

Mr. Earl Zitarelli, Staff Rep.
United Steelworkers of America
100 East Lancaster Avenue
Downingtown, Pennsylvania

The grievances listed below have been settled in Step 4 as noted—

* * * *

L-4529—Withdrawn without precedent or prejudice—2-3-71

* * * *

Please confirm settlement of these grievances by signing in the space provided below.

T. J. Ryan
Manager—Labor Relations

CONFIRMED: /s/
Staff Representative

UNION'S EXHIBIT 344

UNITED STEELWORKERS OF AMERICA
AFL-CIO-CLC
1500 Commonwealth Building
Pittsburgh, Pa. 15222

February 25, 1970

Mr. Hugh P. Carcella, Director
District 7
United Steelworkers of America
334 Suburban Station Building
1617 John F. Kennedy Boulevard
Philadelphia, Pennsylvania 19103

Dear Hugh:

We attach a copy of a proposal from Lukens Steel. This is a suggested test for use in manning the continuous casting operation.

This is by no stretch of the imagination a job-related test. Under the language of the Steel agreements, a job-related test must necessarily be confined to the essential ingredients of satisfactory performance of the job in question and nothing more.

If a job does not require the ability to read, I would challenge a written test in any event, since the taking of such a test involves knowledge which is not job-related, namely the ability to read.

If an employee is being tested for his ability to perform inspection duties, the identification of certain shapes is only appropriate if the job in question requires such identification. The employee's general capacity or aptitude goes beyond any question of "job-related."

I would urge that this proposed test be rejected and our members be advised not to take such a test, because

it is a flagrant disregard of the contract requirements and that any attempt to impose such a test, directly or indirectly, be construed as a flagrant disregard of our good-faith agreement.

We will be glad to be helpful in any manner that you deem appropriate.

Sincerely,

/s/ Ben Fischer
Ben Fischer, Director
Contract Administration Department

CONTINUOUS CASTING APTITUDE TESTING PROGRAM

Prepared by: Charles T. Copeland

January 12, 1970

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PROLOGUE

In developing the ensuing program of aptitude testing for the new Lukens Continuous Casting Facility, a new, more accurate means of selecting tests was used. In order to assure more job relatedness with our testing program, an extensive analysis of all Continuous Casting Bargaining Unit positions was made. This analysis took the form of professional opinion by four experts familiar with Continuous Casting. They expressed their views on the skills, knowledge, and aptitude critical to all jobs on Continuous Casting through answers to a Position Analysis Questionnaire developed by Purdue University. On-site observations of similar positions being manned at other companies were also made by Lukens Representatives concerned with testing.

Following the Job Analysis, an exhaustive study of test publishers was was made wherein over ten major United States publishers were contacted. Personal visits between Lukens Representatives and Representatives of the test publishers were made. Over 200 tests were screened and reviewed for possible inclusion into the final test battery.

The selection of the final instruments was made on the basis of: 1) job relatedness, as measured in a comparison with the Job Analysis; 2) satisfactory test evaluation information; 3) prior experience with the instrument by Lukens personnel. Enclosed in this manual, one will find the appropriate data on most of the final test battery for the first two criteria listed above. The last criteria, prior experience with the instrument, can be summed up by mentioning that three of the instruments have been used at Lukens for over 13 years and one instrument in various forms has been in use since 1942. Obviously, the wealth of local normative information available on these instruments makes it almost

mandatory that they be included. The other instruments were chosen on the basis of publisher data and apriori professional opinion as to job relatedness and validity. Normative information will be compiled, however, before selection decisions are made based on results from these tests.

SCHEDULE AND TIME LIMITS

Fact Number	Test	Directions	Testing Time	Total
1	Inspection	6 min.	6 min.	12 min.
5	Assembly	6 min.	12 min.	18 min.
6	Scales	12 min.	16 min.	28 min.
7	Coordination	5 min. 20 sec.	2 min. 40 sec.	8 min.
8	Judgement & Comprehension	5 min.	35+ min.	40+ min.
13	Mechanics	5 min.	20 min.	25 min.
—	AVA	2 min.	10 min.	12 min.
—	Wonderlic	2 min.	12 min.	14 min.

UNION'S EXHIBIT 346

March 18, 1970

Mr. Ted W. Mathews
2901 N. Bigelow
Peoria, Illinois

Dear Ted:

Enclosed is the material that relates to the Strand Casting Testing Program that you will need to make a full and complete judgment of the tests. You will also find a copy of the contract. The section concerning testing is on Page 110. Because of space and the particular audience to whom I was writing, much of the more abstract-level statistics such as the kinds of reliability, the criteria for validation used by the publisher, and the description of the samples was deleted. I have included extra copies of the test manual for the FACT Series along with a technical supplement put out by the publisher.

The PAQ Analysis that I have included indicates the average job rating on each of the 189 dimensions for all six jobs. The procedure that was followed to obtain these average ratings on each job was similar to the system we anticipate using in the rest of our validation program. What I did on the analysis that I have enclosed is to sum up the scores for all jobs and take the mean score for each dimension. That mean score should be 3.5 or better in order to be considered significant across all jobs. Reviewing the contract language, you will see that it was necessary to have significant dimensions across all jobs in order to use one set of tests.

Ted, the Union is taking a very narrow view of the phrase "job related". They are implying that a test may not be given unless it is an actual specific behavior required on the job. The official note from Pittsburgh indi-

cates that aptitudes as such cannot be measured and cannot be used as a basis for testing. I believe the issue boils down to determining what the concept of job relatedness means.

As you know, Ted, time is of the essence for this particular program. We anticipate going before the Union for the first time on this particular subject on March 25, 1970. I feel that this particular meeting will probably be more of a fact-finding meeting in which we will determine in specific detail the position of the Union on job relatedness. However, I feel that it is extremely important that we have any weaknesses in our program identified and a program originated to find answers for these weaknesses, if any. I also anticipate drawing from textbooks, periodicals, etc., the standard scientific definition of job relatedness to present our position on this matter.

You will shortly be receiving from me a review of the discussion that we undertook relative to the entire validation program so that you and I might meet our deadlines on that project.

See you soon!

Sincerely,

CHARLES T. COPELAND
Psychological Test Administrator

CTC/kmr

Enclosures

cc: N. J. Domangue
J. A. Hall
Files

UNION'S EXHIBIT 357

March 26, 1969

Mr. R. J. Lohr, Coordinator of Training
Personnel Division
Industrial and Public Relations Dept.,
Bethlehem Steel Corporation,
Bethlehem, Pennsylvania 13016

Dear Bob:

The lateness of this note is not a measure of my appreciation for the cooperation Chuck Copeland and I got from you and Dick. Flo—my gal Friday—has been off quite a while with the Chinese crud, and slowed me down on social amenities, expense accounts, and other business essentials.

Both Chuck and I not only enjoyed our visit with you, but found it profitable. We are moving ahead on an overall program. Our first approach, partly as a strategy and a holding action, will be to try to establish the relevance of intelligence to job class. If we can successfully establish this, then we feel we will preserve the right to use intelligence tests in the future—realizing we may well run into nit picking concerning specific kinds of tests but not the theory of intelligence related to job hierarchy. We should be able to accomplish this by August 1 and use it as a show of good faith to buy additional time with which to perform specific validations in job families as yet undetermined by us. If you develop any significant break throughs that are shareable, please keep us in mind. We specifically plan to have at least one meeting with several of the smaller steel companies

in the near future. We shall keep you posted, and would like very much to have you participate if convenient.

Sincerely,

/s/ Norris J. Domangue
NORRIS J. DOMANGUE
Manager—Personnel
Administration

NJD:FL

UNION'S EXHIBIT 439

LUKENS STEEL COMPANY
UNITED STEELWORKERS OF AMERICA
C.I.O., LOCAL #1165

Number L-10989-11

Date 3-9-79

Rec'd By W. Whiteman

Name Paul J. Rice Check No. 5416

Job Dept. Clad & Comv. Div. NiClad

Employee's Statement of Grievance

I, the undersigned, contend the Company discriminated against me because of my color when they denied me the opportunity to earn premium from March 7, 1979. I ask the Company to cease and desist and to pay me all monetary losses.

/s/ Paul J. Rice Date March 8, 1979

First Step, Foreman's Answer: To 3rd Step

* * * *

3rd Step—L.U. #1165 October 9, 1979

Grievance L-10989-11—Paul J. Rice #5416, Cladding—rec. 3-9-79

"I, the undersigned, contend the Company discriminated against me because of my color when they denied me the opportunity to earn premium from March 7, 1979. I ask the Company to cease and desist and to pay me all monetary losses."

UNION POSITION: The Union contends that Mr. Rice was discriminated against and denied the opportunity to earn premium from March 7, 1979.

COMPANY POSITION: The Company stated that Mr. Rice has not been discriminated against.

DISPOSITION: The Company does not condone discrimination. If there was any discrimination, the Company agrees to take the appropriate corrective action.

UNION'S EXHIBIT 442

LUKENS STEEL COMPANY
UNITED STEELWORKERS OF AMERICA
C.I.O., LOCAL #1165

Number L-11616-11

Date 9-18-79

Rec'd By W. Whiteman

Name Paul J. Rice Check No. 5416

Job Dept. H.T. & Fin. Div. NiClad

Employee's Statement of Grievance

I, the undersigned, contend the Company violated ARTICLE XVIII—NON-DISCRIMINATION of the current Labor Agreement and using ARTICLE II—MANAGEMENT to justify it.

I ask the Company to cease and desist.

/s/ Paul J. Rice Date Sept. 14, 1979

First Step, Foreman's Answer: To 3rd Step

* * * *

January 15, 1980

[Third Step]

* * * *

Grievance L-11616-11—The Company will assign jobs on the basis of seniority and qualifications, and the employees are expected to work as assigned.

* * * *

UNION'S EXHIBIT 446

LUKENS STEEL COMPANY AND SUBSIDIARIES
UNITED STEELWORKERS OF AMERICA
C.I.O., LOCAL 1165

Number L-3782

Date 3-6-68 8:30 a.m.

Rec'd By W. G. Pfaff

Name David Dantzler, Jr. Check No. 1603

Address

Job Dept. 120" Mill Div. Heating

Employee's Statement of Grievance

I, the undersigned, contend the Company gave me an unjust 2-week suspension beginning March 5, 1968. I ask to be reinstated, this mark taken off my records, and be paid all monetary losses.

/s/ David Dantzler, Jr. Date March 5, 1968

First Step, Foreman's Answer: Directly to 3rd Step.

* * * *

Grievance L-3782—David Dantzler, Jr., Check #1603, 120" Heating Sub., Rolling Dept.—Rec. 3-6-68

"I, the undersigned, contend the Company gave me an unjust 2-week suspension beginning March 5, 1968.

"I ask to be reinstated, this mark taken off my records, and be paid all monetary losses."

UNION POSITION: The Union claimed that Mr. Dantzler had a headache due to the fumes resulting from the pits being on oil. The Union noted that oil is hotter than gas and suggested that the temperature might have gotten away from Mr. Dantzler. The Union stated that the instant grievance involves the word of Mr. Dantzler against that of General Foreman Bradford.

COMPANY POSITION: The Company stated that Mr. Dantzler, #1603, has a Company service date of 6-13-44 and the following disciplinary record:

Date	Discipline	Reason
10-23-47	Written Warning	Quitting Work Early
4-10-52	Written Warning	Refused To Do Assigned Work
7-11-52	Written Warning	Warning For Not Being On Job
10-29-63	Written Warning	Sleeping On Job
10-16-65	1-Week Suspension	Sleeping On Job
3-8-68	2-Week Suspension	Incompetency or Failure To Meet Reasonable Standards Of Efficiency and Sleeping On Job

The Company noted that Mr. Dantzler's previous discipline for sleeping on the job occurred on Sundays. The Company stated that Mr. Dantzler is a good Heater when he wants to work, but he has a problem staying awake on Sundays. The Company stated that General Foreman J. Bradford had to wake Mr. Dantzler up two times on the 8-4 turn March 3, 1968. The Company stated that Mr. Dantzler failed to read Pits 1, 2, 6, 8, 14, and 15 every hour as is the prescribed procedure, and, therefore, failed to get 17 readings. The Company stated that 15 Pit read 2400° at 1:00 p.m. and Mr. Dantzler was advised by the Observer that it was working. Mr. Dantzler never cut the pit back until it read somewhere above 2600° at 2:20 p.m. The Company produced charge papers marked by the Observer and temperature charts as testimony. The Company stated that the Observer on Mr. Dantzler's turn refuses to awake

him for readings and marks the charge paper accordingly in each instance. The Company also stated that to its knowledge Mr. Dantzler is the only Heater sleeping on the job.

DISPOSITION: The Union will make a written reply to the Company within ten (10) days in accordance with the terms of the current Labor Agreement.

April 25, 1968

John E. Muhs, Assistant Manager—Labor Relations
Lukens Steel Company
Coatesville, Pa.

RE: Grievances L-3782
and BP-3774

Dear Mr. Muhs:

We, the Local Union, have made a further check on the above mentioned grievances and still feel they are justified.

We, therefore, are submitting them to the Fourth Step of the Grievance Procedure.

Very truly yours,

/s/ Michael Reach
MICHAEL REACH, Chairman
Grievance Committee

MR:ns

Grievance L-3782—David Dantzler, Jr., Check #1603, 120" Heating Sub., Rolling Dept. Rec. 3-6-68

4th Step 9-25-68

"I, the undersigned, contend the Company gave me an unjust 2-week suspension beginning March 5, 1968.

"I ask to be reinstated, this mark taken off my records, and be paid all monetary losses."

UNION POSITION: The Union stated that Mr. Dantzler was unjustly suspended for sleeping because other employees were sleeping on the same turn. The Union stated that the other employees consisted of a crane operator and an observer, but the Union could not identify these employees by name.

COMPANY POSITION: The Company stated that Mr. Dantzler has a problem staying awake on the job on Sundays. During the course of this particular turn, he was awakened twice by Mr. Bradford. The Company stated that it has no knowledge of any other employees on the same turn being found asleep. The Company stated that any crane operator in the area would have been involved with maintenance operations because the turn in question was a damp-up turn and no operating crane operators were scheduled. The Company stated that without names of particular persons, the allegations offered by the Union are extremely difficult to verify and the Company must regard them as mere allegations until the Union offers more information.

DISPOSITION: The Company will make a written reply to the Union within ten (10) days in accordance with the terms of the current Labor Agreement.

LUKENS STEEL COMPANY
Coatesville, Pennsylvania

October 8, 1968
Mr. Walter Kurkowski, Staff Rep.
United Steelworkers of America
1700 DeKalb Pike
Norristown, Pennsylvania

Grievance L-3782—David Dantzler, Jr., Check #1603, 120" Heating Sub., Rolling Dept.—Rec. 3-6-68

> "I, the undersigned, contend the Company gave me an unjust 2-week suspension beginning March 5, 1968. "I ask to be reinstated, this mark taken off my records, and be paid all monetary losses."

The Company submits herewith its answer to the above grievance which was heard in the 4th Step Grievance Meeting of September 25, 1968.

In view of Mr. Dantzler's failures to follow the prescribed working procedures for a Heater on the 8-4 turn on March 3, 1968, it is apparent that he was not available to do the work for which he is responsible. The Company believes that Mr. Bradford's report of Mr. Dantzler sleeping on the job is correct.

Mr. Dantzler has worked for the Company for 24 years. He is, however, by his failures to comply with Company rules and regulations, placing his continued employment with the Company in jeopardy and it is hoped that he is aware of this fact. It is also hoped that he will take the necessary steps to improve his record.

In conclusion, in view of the facts and Mr. Bradford's testimony, the Company believes the suspension accorded to Mr. Dantzler was justified and the grievance is denied.

If the decision of the Company in this grievance is not appealed by the Union within ten (10) days from the date of this letter (excluding Saturdays, Sundays and holidays), this grievance shall be considered closed and settled to the satisfaction of both parties.

/s/ T. J. Ryan
T. J. RYAN
Manager—Labor Relations

cc: Mr. Michael Reach

• • • •

LUKENS STEEL COMPANY
Coatesville, Pennsylvania

December 16, 1969

Mr. Eli Rock
1520 Lewis Tower Building
Philadelphia, Pa. 19102

GRIEVANCE L-3782—DANTZLER ARBITRATION HEARING ON DECEMBER 3, 1969

In the hearing on the above grievance, the Company stated it would submit a copy of the arbitration decision on Grievance L-1922, the Clifford Young case. Attached you will find a copy of this decision.

The Company would point out that in the Young case, the foreman testified that he had found both men asleep, Mr. Young and a furnace operator. In the Dantzler case, the foreman, Mr. Bradford, testified that he did not see anyone asleep on the 8-4 turn on Sunday, March 3, 1968, except Mr. Dantzler.

In the hearing, Mr. Dantzler testified that Mr. Bradford awakened him at 1:30 p.m. on Sunday, March 3, and then two other men, Messrs. Fusco and Donnell. He also stated that Mr. Bradford sent the last two named home at 1:30. This cannot be for the time cards of Messrs. Fusco and Donnell both show that these men rang out at 1:05 p.m. on March 3. Copies of the time cards are attached. Finally, the men, after leaving their jobs, probably went to the locker room, changed, perhaps showered, and then walked to the gate where they rang out at 1:05 p.m. Therefore, it could have been 20 or 30 minutes at least before 1:05 p.m. that Messrs. Fusco and Donnell were sent home by Mr. Bradford. I repeat, for emphasis, not 1:30 p.m. as Mr. Dantzler testified.

/s/ T. J. Ryan
T. J. RYAN
Manager—Labor Relations

cc: Messrs. Michael Gaspich
Lloyd Lawrence
Michael Reach

OPINION AND AWARD
GRIEVANCE NO. L-3782

In the Matter of the Arbitration between

LUKENS STEEL COMPANY

and

UNITED STEELWORKERS OF AMERICA,
Local Union No. 1165

Date of Decision: January 30, 1970

APPEARANCES

For the Company—

T. J. Ryan, Manager-Labor Relations; P. T. Scull, Assistant to Manager-Labor Relations; J. T. Taylor, Superintendent-Rolling Mill; W. Jasinsky, Supervisor-120" Rolling Mill; J. Bradford, General Foreman.

For the Union—

M. Gaspich, Staff Representative; L. Lawrence, President-Local #1165; M. Reach, Chairman-Grievance Committee; G. Barrage, Committeeman; J. Quinn, Committeeman; W. Gill, Committeeman; D. Dantzler, Grievant.

STATEMENT OF GRIEVANCE

"I, the undersigned, contend the Company gave me an unjust 2-week suspension beginning March 5, 1968. I ask to be reinstated, this mark taken off my records, and be paid all monetary losses.

"/s/ David Dantzler
March 5, 1968"

Issue

Dispute . . . with respect to 2-week suspension of David Dantzler, Jr.

Background

This grievance stems from certain incidents on the 8-4 turn on Sunday, March 3, 1968. The Company alleges that Mr. Dantzler, who is a Pit Heater, was found to be asleep at about 10:30 A.M. on the day in question by his foreman Mr. Joseph Bradford, that Bradford then sent the grievant back to his job, but that at 12:30 P.M. Bradford again found the grievant asleep. Based on the latter, plus the allegation of substantial product damage owing to the grievant's neglect of his work during and subsequent to these sleeping periods, plus his prior record, the Company imposed a 2-week suspension on the grievant for "Incompetency or Failure to Meet Reasonable Standards of Efficiency and Sleeping on Job."

The Union, in the instant arbitration, has contended that the discipline is unwarranted and should be set aside because two other employees found sleeping by foreman Bradford on the same turn were not disciplined and the grievant was therefore discriminated against. In addition, the Union argues that the Company, in the processing of this case, has improperly referred to earlier disciplines of Dantzler going back more than three years before the instant one, and that this in itself is justification for a setting aside of the grievance under a recent decision in the industry. Lastly, the Union denies the Company allegation of incompetent work and damaged products by the grievant on the day in question.

Discussion and Findings of Arbitrator

Insofar as the grievant's actual behavior on this day was concerned, and leaving aside for the moment the Union's claim of discrimination and its claim of im-

proper Company reference to earlier disciplines, I would see relatively little question that the facts as to the grievant's performance on this particular day warranted the disciplinary action taken. By almost any standard at all, the grievant's pattern of behavior on this particular day could only be viewed as far off the mark of acceptable standards.

Although there was an apparent effort to deny the sleeping charge in the earlier stages of the grievance, this effort was not pressed subsequently; and the record leaves no question but that the grievant was found asleep not only once but twice, on the same day, and within a space of approximately two or three hours. Sleeping on the job is a serious offense, the grievant's job is an important and responsible one where substantial damage can result from neglect of his duties, and he had received a one-week suspension in October, 1965, for sleeping.

Moreover, while the Union may have raised a question as to certain aspects of the incompetent work charge alleged by the Company or as to the validity of the $3,000 damage-to-product figure cited by the Company, I can find little doubt that in point of fact significant damaged work did occur in the grievant's pits on this day—a result which in itself is not surprising, considering the amount of time he spent in slumber on the day in question. It would be difficult from the pit records of that day to counter the Company's argument that the grievant had in fact permitted substantial overheating of some of the pits; and if nothing else, the notations of "washing" on several of the records, made by a bargaining unit Observer on this particular day, would lend basic support to the Company's allegations on this aspect.

Turning, now, to the Union's two basic defenses in the case, it must be observed, insofar as the argument of improper reference to earlier disciplines is concerned, that the parties' *current* contract, signed in August 1968,

does contain in Article IX, F language which is addressed to a 3-year "statute of limitations" on the use of prior disciplinary records. Moreover, as the Union has pointed out, a recent decision by the Board of Arbitration at U.S. Steel, under the statute of limitations clause in that contract, did set aside a discipline solely on the basis that the reprimand form used in the case had referred to disciplines going back more than the permissible number of years under the contract.

The difficulty with the Union's position in the present case, however, is that the instant discipline occurred under and was governed by the parties' *prior* 1965-1968 contract, and that the latter document contained no clause barring reference to prior disciplines. The Company's use of the grievant's prior record in this case was no different than the pattern it has followed in numerous other discipline cases under the contracts preceding the August 1968 one; and there was no showing of any prior grievance or arbitration decision holding that to be improper. Given the latter fact, and given the absence of any applicable contract language requiring it to do otherwise, it would appear that the approach used by the Company in the present case could not, at least under the contract applicable to this grievance, be held to be improper.

The same conclusion is also required as to the Union's other principal argument—regarding alleged discrimination. Basically, the grievant contends on this score that at the time the foreman awakened him the second time, there were also two other employees asleep in the same area, but that the foreman imposed no punishment on them. In his initial testimony on this point, the grievant stated that the foreman had awakened the other two men at about 1:30 P.M. and had told them they could go home at 2:00 P.M. Later in the hearing, the grievant stated that the foreman had awakened him at 12:30 P.M.; that when the grievant opened his eyes, he saw

the other two men asleep directly across from him in the small area involved; that the foreman, who could not help but see the other two, chose not to waken them but rather let them sleep for one or two more hours, before finally sending them home at about 1:30 or 2:00 P.M.

In answer to the above accusation, the foreman testified that he found no other employees asleep on the day in question, and he denied acting discriminatorily in favor of any other employee.

There were no other witnesses who testified on the question, and the issue is therefore one of the credibility of the two witnesses. Unfortunately, the grievant's testimony, as should be evident from the above, is not easy to accept.

His first version appears to state simply that the foreman awakened the other two at 1:30 and sent them home without punishment, with the implication being that the foreman first observed the men at that time. The second version suggests that the foreman earlier at 12:30, in full view of the grievant who was now about to be punished, not only chose not to punish the other two, but even chose to let them *continue* sleeping for another hour or two. Apart from such inconsistencies, the grievant's testimony as to the times involved and his testimony that the other two were sent home at 2:00 P.M. also cannot be supported, since the time clock for the day in question shows both of the other two men to have punched out at 1:05 P.M. (The Company indicated that they had been called in on a special overtime assignment and had gone home at the end of that task.) Inasmuch as the two men would have had to leave the work area 20-30 minutes before clocking out, the grievant's whole sequence of events, with his claim that the other two were permitted to continue sleeping from 12:30 to 1:30, is transparently unacceptable. Taking the fact, also, that the foreman chose *not* to discipline the grievant the first time he awoke him on the day in question, it seems clear

that the evidence in this case cannot support the charge of discrimination.

Apropos the decision in Grievance L-1922 by Arbitrator Crawford, which the Union submitted in the present case and with which I would have agreed, the facts there were basically different. In the Crawford case, it was established and undisputed that the foreman did find two men asleep, but that only one was punished by the Company. This is, of course, entirely different from the present case, where the evidence plainly fails to support a finding that other employees were in fact asleep or were so found to be by supervision.

For all of the reasons discussed above, it will be necessary to deny the grievance in the instant particular case.

AWARD

Grievance L-3782 is denied, and the discipline involved in the case is upheld.

/s/ Eli Rock
ELI ROCK
Arbitrator

UNITED STEELWORKERS OF AMERICA
District Seven
Suite 334 Suburban Station Building
1617 John F. Kennedy Boulevard
Philadelphia, Pa. 19103
Telephone LOcust 3-6826

December 12, 1977

Mr. Leon Whitfield
2944 West Judson Street
Philadelphia, Pa. 19132

Dear Brother Whitfield:

I am in receipt of your recent letter in which you request my intervention into the affairs of Local Union 1165.

On Friday, October 28, 1977, in the Malvern Sub-District Office, a meeting was held in response to your initial letters to Vice President Leon Lynch and Director James N. McGeehan. That letter contained similar accusations against your Local Union elected officials and the Staff Representative who had been assigned to service Local Union 1165. In attendance at that meeting, besides ourselves, were Brother James Brewer of Local Union 1165, Benjamin Pilotti, the President of Local Union 1165, James Brown, Vice President and Chairman of the Grievance Committee, and Staff Representatives Earl Zitarelli and Bert Hough.

After a very *lengthy and thorough discussion* of the charges brought by you and Brother Brewer, a *detailed explanation* was given to you and Brother Brewer by your elected Local Union officers who were present at that meeting. It was *clearly* established at that meeting that you, at no time, brought to the attention of Staff Representatives Zitarelli or Hough your concerns about what you believe to be improper conduct of your Local Union officers and Grievance Committeemen.

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* [Italized material was underlined by hand on original].

Before the meeting adjourned, I requested that certain allegations made by you and not explained to my satisfaction be investigated and you and I were to be made aware of the findings of such investigation. [Hasn't Been done]

I informed you and Brother Brewer of the procedure that has long been established in this District for bringing to the attention of the International Union the concerns and apprehensions of our members. [We are Following Procedure to no avail]

Representative Zitarelli assured you that he would investigate any complaint that you brought to his attention. After receiving your recent letter, I contact Representative Zitarelli to ascertain if you had followed the established procedure. He informed me that you, at no time, have tried to contact him. I, therefore, once again strongly urge that you follow the established procedure and bring your concerns to the attention of the Staff Representative who is assigned to service your Local Union. [We Try]

Trusting this letter may assist you in finding the resolution of your problems.

Personal best wishes.

Sincerely yours,

/s/ Franklin G. Mont
FRANKLIN G. MONT
Key Staff Representative

FGM:d

cc: Leon Lynch, Int'l. Vice President
James N. McGeehan, Director Dist. 7
Lloyd Lawrence, Sub-Dist. Director
Earl Zitarelli, Staff Rep.

[This is an Insult!
Leon Whitfield]

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* [Bracketed material was handwritten in original].

[We have met with our staff representative who *sympathizes* with us. I don't understand this letter with all its words, signifying nothing. Now I am asking for help. We are not afforded job security at Lukens at *present.* Anyone can see & tell you that. It's a fact we at Lukens are being dictated to. I am still appealing for help.

Deeply Confused &
Bewildered
Leon Whitfield]

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* [Bracketed material was handwritten on original].

UNION'S EXHIBIT 472

COMMISSION REPORT

August 6, 1979—9:00 A.M.

at

United Steelworkers of America
District 7 Malvern Sub-District Office
313 Great Valley Center
81 Lancaster Avenue
Malvern, Pennsylvania 19355

Local Union 1165
United Steelworkers of America
District 7
and
Case #E-1787
Election Appeal of Robert Coffey
Member of Local Union 1165
United Steelworkers of America
District 7

Chairman
John H. Reck, Staff Representative
United Steelworkers of America
District 7
200 General Lafayette Building
210 Goddard Boulevard
King of Prussia, Pa. 19406

Secretary
John C. Vogel, Staff Representative
United Steelworkers of America
District 7
1215 E. Market Street
York, Pa. 17403

Commission appointed by
Lloyd McBride, President
United Steelworkers of America
Five Gateway Center
Pittsburgh, Pa. 15222

COMMISSION REPORT

Re: Case #E-1787—Election Appeal of Robert Coffey, Local Union 1165, United Steelworkers of America, AFL-CIO-CLC, District 7

An International Commission composed of the undersigned was appointed to investigate, conduct a hearing, and issue a report on the above case. After due notice to all interested parties, the hearing was held on August 6, 1979 at 9:00 A.M. in the Malbern Sub-District Office, 313 Great Valley Center, 81 Lancaster Pike, Malvern, Pennsylvania 19355.

Members of Local Union 1165 who gave testimony were as follows:

Name	*Title*
Robert Coffey	Appellant
Benjamin Pilotti	President

The Commission advised the parties that its purpose was to conduct a full hearing, including a complete investigation of the facts, and to submit a report and recommendations to the International Executive Board Appeal Panel. The Board would then issue its decision adopting, rejecting or modifying the Commission's recommendations.

All parties were given full opportunity to call witnesses, introduce evidence, and present oral argument. On the basis of all the evidence, including our own observation of the witnesses, and considering the arguments advanced by the parties, we arrived at the following findings and recommendations.

The evidence disclosed that Local Union 1165 conducted nominations June 13, 1979 for a special election to fill Assistant Grievance Committeeman Zone 2 vacancy. Brothers Robert Coffey and Harold Yost were

nominated and ran for the position of Assistant Grievance Committeeman Zone 2. The special election was conducted July 6, 1979 from 7:00 a.m. to 7:00 p.m. at the Local Union Hall. Brother Yost received 12 votes and Brother Coffey received 2 votes. Brother Yost was declared the winner.

Section 13, Page 6, of Local Union 1165's By-Laws states:

> "No person shall be eligible to be elected as a Grievance Committeeman, or Assistant Grievance Committeeman, except in the Zone he is permanently assigned at the time of nomination."

Accordingly, we find:

Brother Harold Yost was not permanently assigned to Zone 2 at the time of the nominations. Work schedule (Form No. 64/999/718-R-7/71) indicates that Brother Yost was assigned and scheduled out of Zone 9.

Therefore, the Commission recommends that Brother Yost be ruled ineligible and Brother Robert Coffey, the only eligible candidate for Assistant Grievance Committeeman Zone 2 nominated, be declared the winner.

We recommend that the findings, recommendations and conclusions contained herein be adopted by the Executive Board of the International Union.

Respectfully submitted,

/s/ John H. Reck
JOHN H. RECK
Commission Chairman

/s/ John C. Vogel
JOHN C. VOGEL
Commission Secretary

Date 9 August 1979

UNION'S EXHIBIT 486

LUKENS STEEL COMPANY
Coatesville, Pennsylvania

June 30, 1969

Mr. Michael Reach, Chairman
Grievance Committee, Local Union #1165
United Steelworkers of America
750 Charles Street
Coatesville, Pennsylvania

NEW JOBS—CONTINUOUS CASTING

With the installation of continuous casting, new jobs will be created which can only be accurately described and evaluated after the process has reached regular operating status. In recognition of the need to man jobs to begin operation, the Company and the Union agree as follows:

1. The Company shall describe and classify the jobs it deems appropriate for the operation of continuous casting prior to extending the bargaining unit employees any opportunity to occupy such jobs. These job descriptions shall be considered tentative and shall state the usual information on the face of the description and the S.H.W.S. job class to be paid on the reverse. Since the actual factor evaluation is not needed initially, it will not be shown.

2. The tentative job descriptions shall be made final with complete factor evaluations one hundred eighty (180) days following the start of actual operations. Any difference between the final and tentative job class shall be paid retroactively. Upon the submission of final job descriptions to the Union, the language of the basic agreement shall operate. Any subsequent adjustment made in any of these jobs under a written

grievance shall be paid retroactively to the date of first occupancy.

3. The tentative jobs may be used by the Company for training purposes prior to the start of actual operations.

If the Union agrees to the above, please confirm by signing in the space provided below and return two (2) copies to us.

/s/ Michael Reach
Chairman, Grievance Committee
Local Union #1165

/s/ T. J. Ryan
Manager—Labor Relations

CONFIRMED:

Date 7-8-69

UNION'S EXHIBIT 489

Civil Rights Committee Meeting
February 17, 1971 3:00-5:00 P.M.
Industrial Relations Conference Room
Revised Minutes

Personnel Present

Company Representatives

James F. Milligan, Chairman
Herman Whiteman
William Gary
Thomas P. Scull
Leonard M. Eaton

Union Representatives

Carl Cannon, Chairman
Harry Cavuto
John H. Robinson
Alexander Musika

The meeting began with the introduction of an agenda containing two questions for discussion by Mr. Carl Cannon, the Union Chairman. A summary of the discussion which ensued follows:

The first question raised concerned the discharge case of David Dantzler, a former Heater in the 120" Mill. The Union questioned whether or not the discharge was an act of discrimination by certain executives of the company. Mr. Scull was requested to explain the Company's position with regard to the matter.

Mr. Scull gave the entire committee a synopsis of what had transpired prior to the actual discharge so that everyone would be familiar with the case. Mr. William Gary explained that Mr. Dantzler had gone to the State Human Relations Commission and the Company was awaiting the decision of the Commission as a result of the investigation which had taken place.

After much debate, Mr. Mulligan stated that the committee would table further discussion of the case to await the decision of the Human Relations Commission.

At that time the case would be reopened for discussion.

The second question posed to the Company concerned the individuals who write racial insults on the toilet walls and what the Company intends to do to eliminate the problem.

Herman Whiteman was called upon to explain the Company's position with regard to the problem. He cited a paragraph from "You and Your Job" under the heading of "Your Responsibilities" which in essence states that "Individuals who deface or mark buildings, locker rooms or any plant property with chalk, paint or any substance will be subject to disciplinary action". He further added that the Sanitation department has been instructed to remove or paint over any defaced walls or lockers that are encountered on their rounds. He gave the opinion that this type of problem has diminished somewhat within the past few years.

* * * *

UNION'S EXHIBIT 519

Dave: This was my opening statement

The case before us is the unjust discharge of David Dantzler.

The grievant David Dantzler has been an employee of Lukens Steel Co. since 1944 and in the Heating Dept. of the 120" Rolling Mills since 1955. First as a heater helper and then as a 1st class heater.

As a heater his responsibility is to operate and watch certain pits, to which he is preassigned. The pits contain various steel and alloy materials in the process of being heat treated, prior to being rolled into steel plates.

The grievant was suspended by Lukens on May 11th and then discharged on May 15th. We believe the Company fired him, *because he is involved in a suit against the Company, because of these racial discriminatory policies and not for his allege neglect of duty.*

Mr. Gill, even if we believe the Company was right on its facts—*but we do not*—we know on information & belief that other *heaters (who are white) done just what the Company* so claims the grievant did. Some have destroyed steel in great amounts and have never been discharged.

The Company claims the grievant caused a "washdown" of steel which cost them money, (wash down as I know it, is the melting of the outside of a slab or ingot, before the inside of that slab is heated through. This could happen either because of a mechanical or human error. The damages could vary).

In our investigation we found & to believe on 8-4 on May 11, 1979 the day the grievant was suspended the 8-4 heater L. Finnefrock caused a burn up. With do discipline. Also throughout the last *several years other white heaters* caused similar damages without a suspension or discharge.

1—Joe Killian

2—Richard and Tom Whiteman

The grievant was suspended on May 11th and discharged on May 15th. Based only on the claims of the Company —these were not supported at those meetings with documents. Documents we requested at the discharge hearing & again on June 26, the 4th Step Hearing. And not received until one month later. Those documents are:

1—Sequences of Hot pits

2—Heat, Gas and Pressure Charts

3—Documents related to its claim that the Company lost steel and the cost.

The background as the Union reviews this case is as follows:

The grievant was scheduled on 5/10/79—4-12 turn as a heater—120" Mill.

The grievant relief his man L. Fennefrock at 3 p.m. He was told & the charts (Sequence and gas charts indicate what was charged in all pits he was responsible for the night including #4 pit.

#3—#4—#5—#6—#14 pits had the same materials that day. A carbon steel of fairly low quality. (Common Carbon or Rockwell 22). All in slab form.

#3 was charged at 12:10 p.m.—40 tons

#4 " " " 3:00 p.m.—60 tons

#5 " " " 11 a.m.—70 tons

#6 " " " 2:05 p.m.—60 tons

#14 " " " 1:45 p.m.—45 tons

The pits containing the 60-70-tons required the same heat treatment from 2350° to 2400° for a period of 10 to 12 hours. With some variation because of the weight.

The grievant as he had stated throughout this complete case, that he had checked #4 pit at 9:55 p.m. and about 10:30 p.m. and prior to being relieved.

When he was relieved at 11:10 p.m. by Joe Cox none of those pits were ready for rolling. Mr. Cox was the oncoming heater.

On the grievants return to work on 3-11 May 11th he was summons to Supervisor Smith office & was told that he was being suspended for a wash down on #4 pit.

The grievant explained that there could not be a wash down when he was there. And that he was relieved by Joe Cox around 11 p.m. When Supervisor still insisted that he was responsible—the grievant requested the documents & proof of his doings—to no avail.

The Union has challenge the minutes of the disciplinary and 4th Step hearing. Because—

1—They did not make a through investigation by checking with Mr. Cox & other employees.

2—The Union had not proof or documents until one month after our June 26th meeting.

3—And that they use a prior discharge against him that was in 1970. Art. IX para. D states after 3 years (as we know they can use).

The grievant contends that for at least a 2 week period prior to this incident & the night of the incident he has complaint to Foreman Gainor Fuel Dept about the mechanical problems of the button not tripping. The eye was clean 5/11/79.

The Union doesn't believe that there was a wash down—if there was he could not be responsible for anything that happen after 11:10 p.m. was he was relieved by the oncoming heater.

The again the Union states that the grievant read the pits prior to being relieved. The pits were not, but should have been read after 11 p.m.

UNION'S EXHIBIT 533

Eleventh Meeting

COMPANY-UNION NEGOTIATIONS

July 9, 1968—10:00 a.m.-4:45p.m.

Industrial Relations Conference Room

Representing Company	*Representing Union*
T. J. Ryan	Walter Kurkowski
E. J. Charlton	Lloyd Lawrence
N. J. Domangue	Charles Witte
J. E. Muhs	Michael Reach
J. F. Mulligan	Anthony Fioriglio
P. T. Scull	James Brown
	Harry Cavuto
	Albert Cooper
	Nicholas DePedro
	Donald Dobson
	Benjamin Pilotti
	John Gillespie
	James Quinn
	Raymond Townsend
	Isaac Whitaker
	Richard Whiteman
	Ernest Wills
	Edward Wright

To discuss hospitalization and other related problems.

UNION COMMENT: The Union stated it feels a change to Blue Cross-Blue Shield would be of benefit to the employees. The Union stated that the Company could realize cost savings and the employees would be provided additional benefits under Blue Cross-Blue Shield. The Union stated that it is also seeking any additional changes that might come out of Pittsburgh. The Union stated that it will present more details to substantiate its proposal.

COMPANY COMMENT: The Company stated that it has accepted insurance benefits from Pittsburgh. The Company pointed out that Blue Cross had recently talked to the Company and did not reveal any particular advantage over what the Company presently has regarding coverage along these lines. The Company pointed out that it is already covered by Blue Shield on surgical benefits. The Company stated that it would like to hear personally from Blue Cross, rather than accept general statements from the Union.

The Company categorized the following zone demands still remaining on the bargaining table.

ZONE 1

1. West Side Locker Room—Negotiable item.

COMPANY COMMENT: The Company stated that this is the only item left in Zone 1.

UNION COMMENT: None.

ZONE 2

1. Furnace 63—propose adding a Heater to work with Straightening Roll Operator—grievance.

COMPANY COMMENT: The Company stated that it considers this matter of a grievable nature because it involves interpretation of existing new facility language and no language could be negotiated to solve this proposal. The Company pointed out that there is presently a grievance filed on behalf of this question.

* * * *

UNION PROPOSAL #40

COMPANY COMMENT: The Company stated that it is confused as to what the Union means by a "reasonable trial period." The Company pointed out that, regarding progression within a unit, an employee, in ef-

fect, gets a reasonable trial period and the Company fails to see a need for language under these circumstances. The Company stated that when an employee transfers across seniority lines, existing contractual language provides for a trial period of 60 days. The Company pointed out that under this language, the Company is the judge of ability and the Union can protest. The Company stated that it feels it should have the right of assuring itself that employees transferring across seniority lines are capable of performing the job. The Company stated that the Company's decision on ability has not been a major problem and yet the Union seeks to limit the Company prerogative in this area. The Company pointed out that the Union has had a right to contest the Company's decision and has not seen fit to do so, so that the Company can only assume that it has been making the correct decision. The Company emphasized that when an employee is moving out of a unit to a foreign endeavor, the Company must have the right to determine if the employee is qualified to meet the minimum standards required of that endeavor. The Company pointed out that it has been willing and continues to be willing to assist any employee who shows an interest in improving his mental capabilities. The Company pointed out that testing is a more objective method of measuring qualifications than straight seniority.

UNION COMMENT: The Union stated that it is asking for a reasonable trial period of 30 days. The Union stated that its primary concern is of qualifications required of employees requesting transfer across unit lines. The Union expressed concern about employees who do not avail themselves of the opportunity to transfer across unit lines because they fear taking a test. The Union pointed out that, particularly with minority groups, employees have not had the necessary education to pass these tests, but are physically able to perform the job.

The Union pointed out that many employees who have failed to pass the test never say anything and, therefore, this may not have been a major problem in the past. The Union stated that it feels that straight seniority should be the primary factor and pointed out that other companies have survived under a straight seniority system.

UNION'S EXHIBIT 623

MEMORANDUM OF UNDERSTANDING

This Agreement dated the 26 day of April, 1965 between Lukens Steel Company and the United Steelworkers of America, AFL-CIO shall be designated as a Memorandum of Understanding.

The changes in contract language set forth in Exhibit A and Exhibit B attached hereto constitute all the changes required to resolve the local issues in dispute and shall be incorporated in the new collective bargaining agreement and any further negotiations shall be limited to those changes in wages, benefits, and other contract terms which may be included in the settlement between the Union and the Eleven Major Basic Steel Companies.

LUKEN STEEL COMPANY

UNITED STEELWORKERS OF AMERICA, AFL-CIO

[Signatures Omitted in Printing]

* * * *

Article XXII—Non-Discrimination

It is the continuing policy of the Company and the Union that the provisions of this Agreement shall be applied to all employees without regard to race, color, religious creed or national origin.

/s/ B. O. Start
/s/ J. G. Ryan
4/24/65

* * * *

UNION'S EXHIBIT 627

A review of the Lukens material reveals a seemingly logical chronology of events leading to the selection of the test battery. However, an analysis of the material prepared by Charles Copeland raises many questions with respect to establishing a good case for the job relatedness of the test battery. For example:

1. Evidence is lacking as to how the Purdue PAQ was used in relating the elements of the six jobs to the tests themselves. Unless this evidence is available, it is difficult to see how the Purdue PAQ can be used as an aid in justifying the tests selected.

2. There are no position descriptions attached nor are there any definitions of the factors which the tests purport to measure. To establish the job relatedness of the battery, the "logical chain" from job to test should be delineated.

3. There are no data enclosed to support or explain the inclusion of the Wonderlic Personnel Test and the Activity Vector Analysis in the test battery.

An extremly sound case should be presented if the testing issue is to be arbitrated. Unfortunately, there are many technical inadequacies in the Lukens case which provide an opportunity for an unfavorable ruling;

1. There is no evidence of applicable validity data for the battery. The statistical evidence appears to be taken directly from the manuals for the Flanagan tests without establishing a relationship to the caster jobs.

2. There is no evidence presented to support the "cutting scores" which are proposed for use by the Company.

3. Are the tests the sole criterion of selection for the caster? If so, this would represent an over-reliance on test data.

4. The tests in the continuous caster battery are not the most recent editions. There is good reason to question the use of the Flanagan Aptitude Classification Tests (1953) when the Flanagan Industrial Test (1960) is more recent and aimed at the industrial setting.

5. Included in the program is a "Publisher Bibliography." Five of the eight references are out-of-date and there are no direct references to any of the books in the text of the program.

6. Nearly all of the data listed in the program are lifted from the test manual for the Flanagan Aptitude Classification Tests. This is misleading in that it gives the impression that more research has been done than has in fact been done.

In manning a new facility the use of tests should be considered more judiciously than in any other case. Indeed, whether or not tests should be used at all is an important consideration.

First, the Company should have the right to test, even if only for the purpose of generating data for the test development studies or future hires.

Second, the tests should be used as a "placement" tool, rather than as a screening device. Often, when test data are integrated with other data, the placement of the individual can be best for the individual as well as for the Company.

Third, the tests should be only a small part of the placement process. Other factors to be considered are: continuous service, foreman's rating, education, physical rating, interviewer's judgment, individual's safety record, etc.

UNION'S EXHIBIT 628

April 1, 1970

We are genuinely appreciative of the time and the obviously careful analysis given our Continuous Casting Aptitude Testing Program. We are sure that our program will be considerably strengthened by the incorporation of the suggestions and observations you have shared with us. We thought it, perhaps, desirable, however, to jot down some generalized but factual answers to some of the questions logically raised by your staff. This is being done as an aid to put our program in balance if it is required or would be helpful in your meeting today with the Coordinating Committee.

For purposes of identity, we are using your paragraphing and numbered points for easy cross referencing.

1. An Operating Superintendent, Supervisor, Industrial Engineer, and the Job Analyst individually scored all items of the P.A.Q. and each of the six jobs. The purpose of the P.A.Q. is to rate elements of job requirements. The commonly agreed to ratings were used to isolate the components that exist in all six jobs to an average or above average degree. Approximately 30 items out of the 189 total P.A.Q. items were significantly related to all six jobs. These 30 items identified five general job components. These 30 items were submitted to the ten leading professional test publishers for their recommendations as to applicable measuring instruments. Some 200 tests were reviewed.

2. This is essentially covered in Point #1, above. Position descriptions, naturally, do exist but were not included in the packet sent you.

3. We have considerable experience with the Wonderlic and A.V.A., and find them useful. They are not ger-

mane to the success of this particular program, however, if their presence weakens our position.

Para. 2, Point 1

True. But through the use of synthetic validity we could validate the tests on existing jobs which contain similar components to those in our proposed continuous casting jobs.

Para. 2, Point 2

No cutting scores have, in fact, been determined to date. Our program booklet states, "final test performance standards will be determined after testing has been completed."

The synthetic validity referred to above could be used as a determinant of cut-off scores along with the normative information from the group tested. We would appreciate your thoughts and recommendations on this approach.

Para. 2, Point 3

No. Other traditional indicative factors, such as foremens' ratings, attendance records, disciplinary records, company service, safety, medical records and current physical examinations are to be considered.

Para. 2, Point 4

The Fact Series (1953) has wide recognition through long use. The 1960 Series was considered, but not used since it does not appear in the Boros 6th Annual Mental Measurement Yearbook and Lukens has had no prior experience with the 1960 Series. We would welcome, however, any information about the 1960 Series which you may have and can share with us.

Para. 2, Point 5

Through an oversight, omitted "test" before "publisher's bibliography" since it is the bibliography compiled by J. Flannigan in connection with the 1953 Series; therefore, reference to the test would not have been proper.

Para. 2, Point 6

All of the data listed in the program were lifted from the test manual for the 1953 Fact Series. There was no intent to be misleading. We appreciate your raising the point, however, and will identify all data more specifically.

We look forward to meeting with your test personnel in the near future for any additional advice, guidance, and recommendations that they can offer. I am sure we will find it beneficial.

UNION'S EXHIBIT 629

Prepared for Presentation at 79th General Meeting of American Iron and Steel Institute, in New York, May 27, 1971

PERSONNEL SELECTION, TRAINING AND START-UP OF A LARGE SLAB CASTER

By

JOHN E. MUHS

Facilities and Procedures Engineer
Lukens Steel Company, Coatesville, Pa.

Synopsis

THE PEOPLE who start up and operate large equipment installations have great influence on the success of the investment. This is a description of the selection and training program which resulted in an optimum response by people to the new installation of a large slab caster. The positive results substantiate the value of thorough selection and training.

Introduction

On April 21, 1969, the Board of Directors of Lukens Steel Company authorized a capital expenditure of approximately $12 million for the installation of a large slab continuous casting machine at Coatesville, Pennsylvania. This action culminated nearly ten years of inquiry into the continuous casting process. During these years of inquiry, every slab caster on the North American and European continents was visited by various Lukens representatives. The steady growth in the variety of steel grades being continuously cast, along with the progressive enlargement of the cast cross section, reinforced Lukens' interest in this rapidly developing manufacturing process.

Lukens Steel Company manufactures heavy steel plate specialties and still adheres to bottom-pouring in the casting of ingots as a means of insuring a high-quality product. The almost obvious cost advantages of continuous casting over bottom pouring were, for a long time, offset by the many questions concerning internal quality of large continuously cast cross sections. This paradox served as a challenge to Lukens' people as each investigation yielded some answers and, in many cases, more questions. In the course of this inquiry, over 1500 tons of continuously cast slabs were purchased and tests were conducted both before and after these slabs were rolled into plates.

As Lukens' fund of knowledge increased relative to the technicalities of the continuous casting process, the importance of the human element in the operation of the process grew as well. Our helpful friends throughout the industry often expressed divergent views except on one point: That the care taken in the selection, training and start-up conduct of the people who will operate the strand casting process is directly related to the ultimate success of the operation. One person who was closely associated with the start-up and operation of a billet caster and a slab caster observed that "each dime spent on personnel selection, training and start-up will return a dollar at full operation".

Following the initial approval in April 1969, groundbreaking took place in July 1969. The construction schedule was compressed into 18 months and the essential mechanical components were scheduled to be available for use in the final training of personnel at the end of 18 months. If this construction schedule could be met successfully, the installation of Lukens' strand casting machine would be accomplished more rapidly than any equivalent installation anywhere.

With full realization that the quality of the operators would have a great bearing on the eventual success of

strand casting and the limited span of time available to accomplish the selection and training of personnel, the activities with respect to the "people" considerations for strand casting began within days of the Board of Directors' authorization. Early in May 1969, a committee was formed to plan and execute the selection and training of people for the jobs to be created by the strand casting installation. This committee consisted of: two members from the Manufacturing Organization, one member from Wage and Salary Administration, one from Training and Development, one from Employment, one from Labor Relations. These six men began immediately toward a goal of recruiting and developing a team of men who would operate our new strand casting installation successfully.

* * * *

The selection factors or determinants for the 106 candidates were compiled and analyzed as follows:

Discipline—At Lukens, if an employee does not experience any formal disciplinary action for a period of three years (exclusive of layoff, sickness, or leave of absence), he is considered to have a clean record; therefore, only the three calendar years prior to 1970 were reviewed. The records of the 106 candidates revealed a variation that ranged from entirely clean records to a few records containing one or more suspensions for conduct of a serious nature. After careful deliberation, marginal and unacceptable designations were made. The numbers were such that far fewer employees were unacceptable than one would expect under strict adherence to the "normal" curve.

Attendance—Again, the three previous calendar years were reviewed and the number of days of absence per year, regardless of cause, was analyzed. Ninety percent of the employees did not exceed 30 days of absence per year in any of the three years and were considered acceptable. Those with 30 days or more absence in one of

the three years were considered marginal, and those with 30 days or more of absence in two or more years were considered unacceptable. The resulting unacceptables were substantially less than if the "normal" had been followed rigidly.

Physical Examination—Each candidate was examined by a licensed M.D. and an examiner who administered standard eye and ear acuity tests. A history of, or a finding on examination, of certain conditions in the following areas was cause for rejection:

1. Disease of the eye and/or ear.
2. Respiratory, cardiovascular, gastro-intestinal or genito-urinary diseases.
3. Disease of the central nervous system.
4. Musculoskeletal defect or disease.
5. Psychiatric disease.
6. Miscellaneous conditions such as high sensitivity to temperature extremes, extreme sensitivity to noise, and herniae of any kind.

The basic object was to insure the inclusion of men with the necessary levels of sight, hearing, reflexes, agility and general good health.

Safety Record—In order to obtain some degree of variability, it was necessary to examine each candidate's complete Company record. The results of this review showed a variation ranging from clear records through those indicating property damage involvement to those showing both non-disabling and disabling personal injury experience. Again, thorough judgment was employed to scale these data to arrive at categories of acceptable, marginal and unacceptable. Our overall knowledge of Company safety statistics made us aware that we were not dealing with a "normal" group with respect to safety and the

number of candidates in each category were far better than if normality had been forced on the group.

Supervisors' Description Form—A Personnel Description check list was used by foremen to indicate the kinds of work-related behaviors exhibited by individual candidates in their present occupation. These attributes were compared statistically with the behavioral activity requirements common to all strand casting jobs. From this comparison, each candidate was rated on how well his profile fit the standard profile necessary for strand casting. Better than half of the group possessed a clear majority of the kinds of job-related behavior required. This was a crucial point in the selection program: If this step had indicated only a few candidates possessing the needed attributes, we would be faced with the possibility of employing less-than-qualified workers. Our beginning assumption, that more than a sufficient number of qualified people were present, was borne out by this step of the program. Once more, the guideline of one standard deviation helped in determining the natural gap in ratings which served as the demarcation between marginal and unacceptable ratings.

Tests—A multiple regression analysis was performed on all test scores yielding a weighted composite test score for each candidate. In this process, four of the seven tests administered indicated no significant weight. Those test results were set aside and only the results of a hand-eye coordination test, a visual differentiation test, and a scale reading test remained in the composite score. Generally, those candidates above the mean for the group were designated as acceptable and judgment was exercised in selecting the demarcation between marginal and unacceptable candidates.

* * * *

UNION'S EXHIBIT 634

LUKENS STEEL COMPANY
UNITED STEELWORKERS OF AMERICA
C.I.O., LOCAL #1165

Number L-11920-5

Date 2-7-80

Rec'd By [Illegible]

Name Gerald A. Boots Check No. 7733

Job ——— Dept. M&F Div. Blacksmith Shop

Employee's Statement of Grievance

I, the undersigned, contend the Company in the person of Foreman Walt Edwards of M&F Blacksmith Shop is discriminating against me on testing in the M&F Blacksmith Shop by comparing my test results with the results of another employee who took the test. I ask the Company to cease and desist, pay me all monetary losses and correct this situation immediately.

/s/ Gerald A. Boots
Date Feb. 5, 1980

First Step, Foreman's Answer:

G. Boots was given a sketch to test for "A" Blacksmith. Work did not comply with sketch #7.

Settled No Appealed to Next Step Yes

/s/ [Illegible] /s/ [Illegible] Date [Illegible]

* * * *

Second Step

Settled No Appealed to Next Step [Illegible]

/s/ George Barrage

* * * *

3rd Step—L.U. #1165 March 10, 1980

Grievance L-11920-5—Gerald A. Boots #7733, Smith Shop—rec. 2-6-80

I, the undersigned, contend the Company in the person of Foreman Walt Edwards of M & F Blacksmith Shop is discriminating against me on testing in the M & F Blacksmith Shop by comparing my test results with the results of another employee who took the test. I ask the Company to cease and desist, pay me all monetary losses and correct this situation immediately.

UNION POSITION: The Union contended first that the sketch did not show tolerances and was therefore unfair. The Union also contended that Mr. Boots had not been given proper amounts of time to learn the skills necessary to pass the test. The Union also contended that clevis' are not a prime part of the blacksmith's job. The Union said that Mr. A. Reid also took the same test and that his piece was not exactly as described by the test sketch yet he was passed.

COMPANY POSITION: The test referred to in the instant grievance is the test to move from Blacksmith "B" to Blacksmith "A". The sketch and instructions are attached. The Company states that there was no secret as to what this test was and that Mr. Boots had been around clevis' enough to be able to ask any questions he needed to ask. The test is job related and is reviewed by the foreman. In Mr. Boots' case there were many small errors which in total made the piece unacceptable. This policy is not inconsistant with the testing process

previously used in the blacksmith shop. It has always been the foremans evaluation of the employees performance which determined advancement in the blacksmith's shop.

DISPOSITION: Since the instant 3rd Step Meeting, the Company has made a further review of the facts involved in this case and must continue to deny the request of the Union.

UNION'S EXHIBIT 655

UNITED STEELWORKS OF AMERICA
CIVIL RIGHTS COMPLAINT FORM

Local Union #1165 District #7

Check or Badge # 6730 Date Aug. 18, 1979

Name of Complainant(s) Kennett Young

Address 5711 Meadow Lake Drive Tel. # 269-7866
Downingtown, Pa. 19335

/s/ Kennett F. Young

NATURE OF COMPLAINT

Denied equal opportunity to work overtime on this bidded job.

RELIEF REQUESTED

to be made whole

This alleged discrimination was based on (check):

Race ☒ Color ☐ Religion ☐ National Origin ☐
Sex ☐ Age ☐

* * * *

CIVIL RIGHTS COMMITTEE MEETING
September 21, 1979
Employment Conference Room

Representing Company	*Representing Union*
N. J. Thompson	Thomas James
D. R. Copeland	Benjamin Pilotti
	Allen Mowday
	Richard Jacks

Mr. Newton Thompson reported on progress on Grievance L-10426-5 involving a charge of discrimination by Mr. Kenneth T. Young. Mr. Thompson presented statistics on overtime for Mr. Young for the year 1979. Mr. Thompson pointed out that these statistics showed no discrimination. Mr. Thompson further stated that he and Mr. Thomas James had met with Mr. Kenneth Young and discussed this matter with him. Mr. Thompson reported, and Mr. James concurred, that Mr. Young was satisfied with this investigation and found the finding satisfactory. It was agreed that 1979 showed no discrimination and that prior history in this matter was resolved satisfactorily. Mr. James stated that Mr. Thompson had done a fine job in this joint investigation.

Mr. Pilotti stated he had received a verbal complaint from Mr. Sam Clark. The complaint centered around scheduling discrimination. Because of prior complaints by Mr. Clark, it was agreed that Messrs. Thompson and James would investigate this complaint and report during the next Civil Rights Committee Meeting.

/s/ D. R. Copeland
D. R. COPELAND, Asst. Manager
Labor Relations

[distribution list omitted in printing]

UNITED STEELWORKERS OF AMERICA
LOCAL UNION 1165
AFL-CIO-CLC

September 24, 1979

Mr. Frank Mont, Chairman
International Committee on Civil Rights
United Steelworkers of America
5 Gateway Center
Pittsburgh, Pa. 15222

RE: Civil Rights Complaint
Kenneth T. Young
Dated August 11, 1979

Dear Mr. Mont:

A joint meeting between Mr. N. J. Thompson, member-Civil Rights Committee for Lukens Steel Company, Thomas E. James, Chairman-Civil Rights Committee for Local Union #1165 and Kenneth T. Young was held September 20, 1979 to address Grievance L-10426-5 and Civil Rights Complaint contained herein.

A discussion of the Complaint was aired and it was agreed by the parties that the solution to the problem has been implemented, and the Company agreed to make a random check to see that the problem does not occur again.

/s/ Thomas E. James
THOMAS E. JAMES, Chairman
Civil Rights Committee

[distribution listed omitted in printing]

UNION'S EXHIBIT 661

UNITED STEELWORKERS OF AMERICA
District Seven
Suite 334 Suburban Station Building
Philadelphia 3, Pa.

April 15, 1964

To All District 7 Local Unions
United Steelworkers of America

Dear Sir and Brother:

The Annual District 7 Washington Legislative Conference will be held on June 10th and 11th, 1964 at the International Inn, Thomas Circle, 14th and M Streets, N.W., Washington, D.C. The sessions will commence at 8:30 A.M., each day.

This annual conference furnishes a vital service to the membership by providing an opportunity for the Local Representatives to become familiar with, and participate in, the legislative processes of our Federal Government, and an opportunity to express our viewpoint on major legislative issues to our Senators and Congressmen. We are quite proud of the fact that our delegations have been continually commended for their knowledge of the issues, and their factual agreements in favor of legislation designed to promote the interest of our members or against legislation detrimental to our members interest.

The conference will include breakfast at 8:30 A.M., cocktails at 6:30 P.M. and dinner at 7:00 P.M. on the 10th, and breakfast at 8:30 A.M. on the 11th. A registration fee of $12.00 per delegate is required to help meet the cost of the above functions and the conference. Checks are to be made payable to District 7 Legislative Committee of Pennsylvania and mailed along with the attached form to the District Office.

The International Inn, one of Washington's newest, has agreed to charge $13.00 single and $17.00 double or twin with no charge for parking. *Hotel accommodations are difficult to obtain at this time of the year in Washington, and we suggest that delegates immediately after their selection make their reservations on the cards enclosed for that purpose. Please note the Inn will not accept reservations after June 2, 1964 and that no rooms will be held for arrival later than 11:00 P.M. without a prior payment of one night's rent.*

We urge all Local Unions to take advantage of this educational endeavor by being represented at this important conference. The number and selection of delegates is entirely a Local Union matter. However, we suggest you consider sending at least the Chairman of the Legislative Committee and Political Action Committee.

Looking forward to greeting your delegates at the conference,

Fraternally yours,

/s/ Hugh Carcella
HUGH CARCELLA, Director
District No. 7

[expense disbursement records omitted in printing]

UNION'S EXHIBIT 664

Albert Cooper

1950-54	Trustee
1954-58	President
	Committeeman, zone 2
1958-62	Committeeman, zone 2
1962-73	Financial Secretary
	Assistant Committeeman, zone 2
1973-75	Committeeman, zone 2
1975-79	Financial Secretary
	Committeeman, zone 2
1979-present	Financial Secretary
	Assistant Committeeman, zone 2

UNION'S EXHIBIT 702

GRIEVANCES OF INDIVIDUALS APPEALED TO ARBITRATION

	Total Number of Grievances Appealed	Whites/(% of Total)	Blacks/(% of Total)
June 1967-June 1973	39	20/(51.3)	19/(48.7)
June 1973-December 1979	47	24/(51.1)	23/(48.9)
TOTAL FOR: June 1967-December 1979	86	44/(51.2)	42/(48.8)

UNION'S EXHIBIT 703

OUTCOME OF GRIEVANCES APPEALED TO ARBITRATION

	Whites			Blacks			Total		
	Granted Whole or In Part	Denied	% Grievances Granted	Granted Whole or In Part	Denied	% Grievances Granted	Granted Whole or In Part	Denied	% Grievances Granted
6/67-6/73	5	15	25	11	8	57.9	16	23	41.0
6/73-12/79	9	15	37.5	15	8	65.2	24	23	51.1
Total for:									
6/67-12/79	14	30	31.8	26	16	61.4	40	46	46.5
6/67-6/73	5	15	25	11	8	57.9	16	23	41.0
6/73-12/79	9	15	37.5	15	8	65.2	24	23	51.1
Total for:									
6/67-12/79	14	30	31.8	26	16	61.4	40	46	46.5

UNION'S EXHIBIT 706

BLACK GRIEVANCE COMMITTEEMEN AND ASSISTANT GRIEVANCE COMMITTEEMEN

June, 1967 to June, 1970

COMMITTEEMEN:	Isaac Whittaker
ASSISTANTS:	Carl Cannon
	James Brown
	Therman Gaines
	James Pinkney 9/68 to 10/68

June, 1970 to June, 1973

COMMITTEEMEN:	Carl Cannon
	James Brown
ASSISTANTS:	Richard Jacks
	John Robinson

June, 1973 to April, 1976

COMMITTEEMEN:	Carl Cannon 6/73 to 6/74
	James Brown
	Ben Elliott 3/75 to 4/76
	Therman Gaines 6/75 to 4/76
ASSISTANTS:	John Robinson 6/73 to 9/74
	Ben Elliott 9/74 to 3/75
	Al Carey 3/75 to 4/75
	Therman Gaines 6/73 to 6/75
	Thomas James 6/75 to 4/76
	Oscar Garland 4/75 to 4/76
	Edward Mayo 3/75 to 4/75, 9/75 to 4/76

April, 1976 to April, 1979

COMMITTEEMEN:	Richard Jacks
	James Brown
	Ben Elliott
	Thomas James
ASSISTANTS:	Therman Gaines
	George Havelow, 7/76 to 4/79

April, 1979 to date

COMMITTEEMEN: James Brown, 4/79 to 7/79
Ben Elliott, 8/79 to 10/79
Thomas James
Therman Gaines, 10/79 to date

ASSISTANTS: Leon Whitfield, 4/79 to 10/79
Ben Elliott, 10/79 to date
Therman Gaines, 4/79 to 10/79

UNION'S EXHIBIT 750

STATEMENT OF BEN FISCHER

As an official of the International Union, I participated in each round of negotiations with the steel industry since 1959. I am familiar with the documents issued and used by the union in negotiations during that period.

1. Each of the exhibits listed below is a correct copy of a document that was formulated and issued by the International Union Wage Policy Committee, as an official statement of the International Union on the goals to be sought in collective bargaining with the steel industry in the years specified:

> Pages 315-320 of U-157 constitute the official statement of the Wage Policy Committee dated April 30-May 1, 1959.

* * * *

2. Pages 293-314 of U-157 constitute a statement of the bargaining proposals advanced by the International Union in negotiations with the basic steel industry in 1959.

* * * *

In 1974 and in 1977 the Basic Steel Industry Conference issued an official statement of bargaining goals for the Basic Steel Industry. U-231 is the 1974 statement; U-232 is the 1977 statement.

3. Each of the exhibits listed below is a correct copy of the International Union's staff working papers which contain statements of the Union's bargaining objectives. They were prepared for use in negotiations with the Basic Steel Industry in 1974:

> U-235 is a discussion paper for contract issues of importance at the company level;

* * * *

4. Each of the exhibits listed below is a correct copy of an official document written and issued by a committee or subcommittee formed, pursuant to negotiations, of representatives of the International Union and representatives of the steel industry. The statements of Industry and Union positions in these documents reflect the parties' actual bargaining positions on the issues they cover.

* * * *

U-135 is the joint report of the Contract Review Subcommittee to the Human Relations Committee, dated December 8, 1964.

U-143 is the report of the Joint Testing Task Force, which performed the study that was agreed upon in the 1965 negotiations (see page 71 of U-136).

* * * *

9. U-158 is a document which contains actual proposals made by the International Union to the Human Relations Research Committee during the 1962 negotiations. In the 1962 negotiations that Committee was the primary forum for negotiation of contract issues in the Steel Industry.

* * * *

12. Each of the following exhibits consists of excerpts from the Industry-level master agreement (or from the "Blue Book" which is drawn up to translate the master agreement into the U.S. Steel contract language for use as a model for changes in other companies' agreements) for the years noted:

* * * *

U-138 consists of excerpts from the 1968 Blue Book;

* * * *

13. Each of the following exhibits is a memorandum prepared by myself or members of my staff under my direction in connection with work done by Joint Industry-Union Committees in the years and on the subject noted below:

* * * *

U-144 was prepared in 1967 and was presented to the Industry in the 1968 negotiations on the subject of testing;

U-145 was prepared in 1967 in connection with the 1968 negotiations on the subjects of testing and apprenticeship.

14. Each of the following exhibits consists of contemporaneous minutes or memoranda of meetings between representatives of the Union and representatives of the Industry in the years and on the subjects noted below:

* * * *

U-140 is a memorandum reporting the work of the Human Relations Training Subcommittee, as of June 1964;

U-146 consists of minutes of the General Contract Review Committee, in 1968, on the subject of testing;

U-151 consists of minutes of several meetings of the Joint Industry-Union Committee on Apprenticeship in 1966, and related memoranda. This committee was formed to conduct the study agreed upon in the 1965 negotiations.

* * * *

Throughout this statement, the term "the industry" refers to the Basic Steel Industry Coordinating Committee (or its equivalent in a particular year), which consists of the largest basic steel companies. Negotiations with the Coordinating Committee set the patterns for bargaining with smaller companies in the industry.

/s/

BEN FISCHER

Dated: April 28, 1980

UNION'S EXHIBIT 767

NEWS RELEASE

Rayfield Mooty
1627 S. Central Park
Chicago, Illinois 60623

At a National Ad Hoc Committee meeting held at the Holiday Inn, Philadelphia, Pennsylvania, on January 18 and January 19, 1969, endorsements were given to candidates seeking international offices of the United Steelworkers of America.

Mr. I. W. Abel, Mr. Joseph P. Molony and Mr. Walter J. Burke were endorsed for the offices of President, Vice-President and Secretary-Treasurer respectively. Mr. Nathaniel Lee, Mr. Steven Caruso and Mr. Lawrence Hogan were endorsed for the position of International Tellers.

The Ad Hoc Committee feels that it must support the policies of the incumbent International officers and is committed to do everything in its power to insure their re-election. Because of his involvement and committment to the civil rights movement, the Ad Hoc Committee feels that President Abel best demonstrates the qualities which are compatible to the interests of the minority groups. Since becoming president of the United Steelworkers of America, President Abel has made it possible that Black employees on the International level be doubled with the integration of departments that have never had Black employees since the creation of USWA.

In reviewing the events of President Abel's past term of office, many gains are evident. These include revolutionary improvements in the areas of apprenticeship training, new concepts in seniority guaranteeing employment opportunities to all, inter/inner plant transfers enabling Negroes to move into areas which were formerly closed to them, more involvement in hiring prac-

tices, meaningful civil rights mechanisms between the parties (there is contractual recognition of local union civil rights committees) etc.

Because of the basic goals and objectives of the AD Hoc Committee, we are endorsing the candidacy of Mr. Leander Simms for Director of District 8, USWA. High priority has been given to having a Black person in a policy making position and the Ad Hoc Committee feels that the election of Mr. Simms is a means in which this might be accomplished.

UNIONS' EXHIBIT 1000

Oral Deposition of VERNON R. GREENLEE, taken pursuant to notice at the United Steelworkers Union Hall, 750 Charles Street, Coatesville, Pennsylvania on Wednesday, November 14, 1979, beginning at 9:44 a.m., E.S.T.

* * * *

[2] VERNON R. GREENLEE, after having been first duly sworn, was examined and testified as follows:

* * * *

[3] Q Good. Mr. Greenlee, the company's records indicate that you were hired at Lukens in 1923; is that correct?

A Correct.

Q And that you first worked in a General Labor Gang or Subdivision.

A Yes.

Q Then on the Open Hearth Floor; is that correct?

A Yes.

Q And then in the Open Hearth Pits where you worked [4] until you retired?

A That's right.

Q And that you retired in 1964?

A Right.

* * * *

[12] Q Do you recall whether in the course of the Steelworkers Organizing Drive whether there was any discussion of the question of company discrimination against black employees? That is whether the company had discriminated or whether the union hoped to be able to do anything about that.

A It wouldn't come up too much in the old days because we knew and I knew before I come here that among blacks [13] it was really in your Country and in your law. You see, we knew that we couldn't, we would get a job and money but we knew that we wasn't going to get what the others did because during that time we

had a meeting in Lancaster, whites and colored, and it was brought out. And some of the union fellows, one of the colored professors from the Howard [phonetic] University, that the Constitution wasn't even thought about or wrote about to protect the Negro. Because I was born in Maryland but even in Pennsylvania I worked for George W. Miller but we didn't set at the same table. So I was brought up that way and when I came here I didn't go in the same restaurants. I was brought up that way. We wasn't looking to take over, we couldn't do it. And the union knew that. Because in the '40s, during the war, we had a case probably you saw through there some back money came to the Pitmen and that I was one black of the eight or nine or ten white that was down on the Stabilization Board, the War Labor Board in Washington there. They could go and eat and the company offered me five dollars to get some transportation to go out to eat. And he said "Sorry, but what can we do, we'll get locked up." Roy Widdoes [phonetic] said that. So that was the landlord then. And when I got back, they had been in session for [14] over an hour or more. They brought me up to date—"Did you have a nice meal," or something like that. I remember that.

Mike Reach, all of us went. We were talking about that before how things change. So the union couldn't say much about that.

* * * *

[22] Q Do you recall handling any grievances of black employees that involved what appeared to be race discrimination by the company?

A I handled the Matthews case which was the first black to go in the Cranes.

Q Was that Otis Matthews?

[23] A Yes.

Q What was the nature of that grievance?

A The employees, the company assigned them there to go to work. And the Crane Runners, when he [Mat-

thews] got up in the crane, they didn't run the crane and he had to come down. The man called him down. He said "Come down out of the crane."

Q So the other Crane Runners stopped work in protest of him having been put up in the cranes?

A Yes.

Q What department was this in?

A Plant 4.

* * * *

BY MS. CLARK:

Q I gather that Mr. Matthews had the seniority to get [24] that job?

A Yes. I don't think he was bumping anyone. I think it was an opening.

Q How was it that this problem came to your attention, if you remember?

A I happened to be in the Union Hall when he came up and he told me about it. So we worked a little different from—of course that doesn't concern you—we worked different than the way they do now. I called in to Philadelphia.

Q Do you recall who it was you called in Philadelphia?

A I called in to Philadelphia when it happened, to the union I called. And they said they would be out the next morning at ten o'clock. The President, I think, was out of town and she left word that the meeting was scheduled.

I got hold of the company that we were to have a meeting next morning at ten o'clock.

Q Now, what office did you hold at that time?

A I think I was Chairman of the Grievance Committee.

Q Do you recall who it was that came in from Philadelphia for the union?

A No, I don't. I was thinking afterwards I don't know which man came.

[25] Q Was it the Staff Representative or would it have been somebody else?

A I think it was the Staff Representative.

Q Do you recall what happened at that meeting with the company?

A Well, they agreed to fire those that refused to work. The union and company agreed to it and both signed it and the Superintendent posted it and they sent him [Matthews] back in the crand the next morning and everybody worked. I didn't go down in the plant.

* * * *

[26] Q Were there any other grievances or complaints of employees that you recall taking care of where there was some question of company discrimination?

A Lots others. I would pick out some that didn't amount to a whole lot. One was getting the blacks into the cranes. Although when I came here, it was a black in the engineer.

Q Do you remember his name?

A He had his foot cut off. I can't think, it may come to me. He got his foot cut off on the track, on the Conductors or something. And they put him up in the Engine and into the Locomotive Shop. It wasn't crane, it was Locomotive. And they put him up in there but when he died—he was up there four or five years—and there weren't no more that went up.

[27] Q Into the Locomotive Shop?

A Yes. It was more coming in on the subdivision in this and that.

Q Was there any effort then made subsequently to open the Locomotive job to other blacks?

A Well, maybe it were, I don't know. But I do know that I handled the case for three or four of them—Jesse Gaines and Gus Moore, Ed Green. They all went off at one time from conducting up to run Engine and I handled their case. I don't know everything about it but I know I was the one doing that, that we did put them back in there and put the seniority that they would get the Conductor off the track. And then the Conductor would go up in the Engineers. But that was Arbitration ruling.

Q Now, at that time were the men working in the Conductor's Subdivision mostly black or white?

A Mostly black.

Q And the Engineers?

A White, mostly.

Q And you say there was an Arbitration ruling that provided for the Conductors to move up into the Engineer's job?

A Yes, the company should have records of that.

[28] Q Were there any other similar incidents that you know of where there were efforts in getting a black into jobs that the company seemed to be excluding blacks from?

A Well, I don't remember too many that amounted to a whole lot as Arbitrations. After we had gotten them into the cranes, after we had gotten them into the Engineers in my time. I do recall the trouble that they went through with the Bricklayers but I was on my way out and sick leave. But the union, I know when they put the first black Bricklayer in there but it wasn't me that handled that matter.

Q Do you recall who that first black Bricklayer was?

A James.

Q Jerry James?

A Yes.

Q Are you familiar with what it was the union did in order to help him get that job?

A I don't recall whether it was an Arbitration or whether it was just discussion. But I do know I think they went to the top and somehow or another through the regulations. I don't know if it was Arbitration because I wasn't handling it. It was started but then I wasn't the one that finished it.

* * * *

[30] Q Did you ever hear any other black employees saying that they believed the union didn't do as well for black employees as for white employees?

A I never got that but you see my handling was back when blacks kind of knew they didn't have much to go

and come on. Because you see I was handling way before the Civil Rights and Negro rights and all that came through. We didn't have them in Court when I was handling it. And in Washington it's only been after that that you could eat. Because I came out of Maryland and used to drive back and forwards to Maryland in one place. And I think it was in '68 before I saw blacks parked around that place to eat. But since that time why I guess [31] everything must have changed. Just how fast the company recognized it and all, I don't know, because I was out.

The last work I done in the union was in the '50s and we was dealing with the company in the '50s.

* * * *

[35] Q After the job evaluation system?

A Yes, that was somewhere around '47, '48, around when we got into it. US Steel started the year before. And we went over all jobs to evaluate them. Some got a raise and some got a decrease in pay if your job was too high. I was in on that. And the reason I know a little something about it, that my job got a little raise, went to Class 16. That's the reason I could remember that.

And some jobs around the plant, that's not in your record and I suppose you wouldn't put it in, but I am just saying this. The job evaluation was a good thing, I think it helped the blacks considerably.

[36] Q Prior to that was there any kind of job classification system at Lukens, anything like a job designated as Class 1 or 2?

A Well, they had a different system of what they would pay for First, Second, Third and Fourth man. And so it wasn't active as a job evaluation. I think you are familiar with a job evaluation, the fact that it was health and physical ability and all like that, which gives you the points. And that's what they had and that's what they do everywhere now. I don't think the Government had any until US Steel got them.

Q In what way was it that that system helped the blacks considerably at Lukens?

A Well, pulled up a lot of jobs.

Q Raised the job class, raised the wages?

A Pulled up a lot of jobs. And it would help a lot of others besides blacks, but more blacks in low job classifications than whites. And naturally they would come up higher, especially like the Track, they got a raise.

Q The Track Gang?

A Yes, they got higher.

* * * *

[49] A Well, yes, I can recall when we . . . I would put it this way. I can recall when we had no wash rooms. We had a locker and we had towels and soap and a bucket on the platform. And you went to a certain place to get hot water. And I don't think at that time it was any segregation because most of the toilets was just outside when I went there. It might have been one around before somewhere in the office but people wouldn't go into that. The Laborers and all had the outside toilets. Of course I know you all don't know nothing about it.

* * * *

THE WITNESS: But when they did put them in, it was some discrimination there although it was where you went, they were built practically the same.

BY MS. CLARK:

Q Do you recall when it was that they built those and set them up?

A In the '30s. It might have started some in the late '20s. I guess in the late '20s they started to fixing up toilets and going along wash houses, we used to call them. [50] And this and that. But then they had separate for quite a while.

Q Now, do you know of any time after the union came in that the union discussed with the company the question whether the wash rooms should be integrated?

A I don't know of any time. I don't know that the wash rooms were brought up. I remember when they built the wash rooms but I don't think the wash rooms was ever questioned.

Q Do you recall any discussions among union officers or at union meetings about the segregation of the wash rooms and whether they should be integrated?

A No, I will say this. In the Open Hearth Pits it was segregated and in the Open Hearth in the Yard they were not because colored and white went to the same one.

* * * *

[52] Q Did you ever hear any union officers stating a personal opinion that the locker rooms should remain segregated or opposing the idea of integregating wash rooms?

A Never brought up, not around the Open Hearth. When we had a strike, that's when they would assemble, and both sides would talk and talk and we didn't know which was which because there was no signs up there. But otherwise, back in those days I don't think the colored was concerned much because everyone else was segregated. And naturally it was some segregation in Lukens, sure, because everywhere else was.

We didn't eat out, we was brought up that way. And so it changed step by step until as it is.

* * * *

[68] Q During the time that you were active in the union, do you know of any time when a black employee may have come to the union complaining that he was being [69] discriminated against by the company and the union refused to give him any help or failed to give him any help?

A I don't recall that. They would offer their assistance. Now, it may not be as he thought it should be and again it might have been. He might have gained something by it. But I am quite sure that he would get help from somebody in and around the union.

* * * *

[107] Q In the discussion of those local issues in any of the negotiations where you were present, do you remember anybody from the company or the unions' side [108] talking about the equal rights of black employees at Lukens?

A Not too much because we didn't know anything about equal rights until we were played up all over the Country. You see, we might have come in in other words putting it around. It wasn't equal rights back in the '50s.

Q Do you remember in any of the negotiations, do you remember any local issue that was ever discussed that was concerned mainly with race? I know you said that you wouldn't discuss race in negotiations generally. Do you remember anything—

A Not when they were trying to get them back off the street. We would be trying to get them back off the strike or the issue we went out for for more money and that would include everybody and they wouldn't take time—when the strike was out there at General Motors and all, they wouldn't bring in no racial issues. They would do whatever they could to get them back off the street and what was left would be left to negotiate after you got them back to work. I guess you noticed that. The main thing was getting them back to work and getting the plant rolling. And the main thing we wanted was to get our paycheck rolling.

[109] Q Do you remember in any of the negotiations when you were present anybody saying they were for or against something that was being discussed because it was not fair to blacks?

A No. The only thing that I could stand on or say is that it was no different here from anywhere else back in those days that blacks didn't get a fair shake on all the jobs. They didn't in the schools, they didn't in the Army. They had that slaughter there in Italy of all blacks and it happened to be that I knew him in person, Colonel Queen [phonetic] and they took him out and put another man back ahead of him. I knew him personally

from Washington. His summer home was up here in Parkesburg. But it was segregated, segregation, all blacks. And so we had it here right during the war all up and everywhere else. And the company, no question about it, I don't think they would even say it wasn't segregation through all that, that far back. And we had to deal with it. But after the Civil Rights, it was a different law. Then I wasn't in the union.

* * * *

[118] Well, let me ask you this. If they were not union people, why did the union have to sign a contract with the company to get Otis Matthews into the crane?

A Well, the company, they wasn't all union men—some were. And the company had put him up there. And they wanted to pull us in to help fight that battle so that we wouldn't file any grievance on any of them.

Q So the agreement that the union signed covered those employees who came down who were union members?

A Covered them all if they didn't work there that they would be fired.

Q But what I am getting at is what was it the union agreed to? Did the union say "If you fire the union members who come down, then we won't file a grievance because we agree with you that they ought to stay up there?"

A We agreed that whoever would be in there would be fired if they didn't work. That's what the man stated to them right from Philadelphia. He said that it was wrong, the union didn't operate that way and the other men would be fired and nobody protested, because we don't operate that way.

* * * *

Defendant Unions' Proposed Findings of Fact

[Filed in district court after trial; title omitted in printing]

* * * *

118. Consistent with this policy, the record contains evidence of numerous instances in which union representatives *did* file grievances which expressly alleged violations of the non-discrimination clause, or alleged discrimination "because of . . . color" or "because of . . . race" or simply alleged "discrimination" in a context which shows that race discrimination was put at issue.[44] Similarly, the record shows that in several other instances, in which a grievance for a black employee did not expressly allege race discrimination, the Union, in processing the grievance, argued that the grievant had been discriminated against because of his race.[45]

---

[44] For Grievances expressly based on Article XVIII, see U-442; P-814; for grievances alleging discrimination based on "color," or "race," see U-439; P-736; P-744; U-262; L-509. In U-263 the Union alleged "discriminati[on] against me by putting a white man in a job that I bid." In U-261, the grievance alleged discrimination, and in defending the grievance the Union stated "grievants are black employees and the Union questions whether this is the reason for requiring a test"; similarly, in U-264, the grievance alleged discrimination and the Union argued that "the Company should not discriminate against any black or female employees." In U-268 and U-57 the Union filed a grievance alleging "discrimination" and also filed civil rights complaints (each of which is part of U-245) expressly based on race.

In addition to these grievances, in P-739, P-740, U-634, U-276, and P-848 the Union claimed "discrimination" in grievances filed on behalf of black grievants, but the record does not otherwise indicate whether the reference was to racial discrimination.

[45] In U-266, a grievance of a black seeking to become a bricklayer, the Union, at the fourth step, made the "charge of discrimination" and requested information as to "the number of minority employees who are bricklayers." In P-957, a disciplinary grievance

119. In addition to filing discrimination grievances, the record establishes that the Union also presented numerous racial discrimination complaints on behalf of individual employees to the Civil Rights Committee.[46] . . . .

* * * *

---

for a black, the Union, alleged that the Company was "discriminating against the grievant"; the company responded that "racism is not involved . . . since the grievant's foremen are both Negro and white." In David Dantzler's 1968 suspension, the Union charged discrimination (U-446, at 11), comparing the treatment Dantzler received to the treatment of two white employees (*id.* at 14-16). In Dantzler's most recent discharge proceeding, Union staff representative Santoro's handwritten version of his opening statement shows that he alleged that Dantzler was being discriminated against because of his race (U-519); Santoro confirmed making the charge (Tr. 24.145-147). For other instances of union representatives raising claims of racial discrimination, see Rice 7.35; Zitarelli 13.167-168; Brewer 29.159.

The instances listed above cannot be deemed to be exhaustive, given the absence of any subject-matter index to grievances (Pilotti 28.107; compare U-692, p. 2 with U-57).

[46] U-653 (Kenneth Young complaint); U-245 (Dixon, Butcher, Fields, Brickus complaints); U-654 and U-688 (Clark); U-435 and U-650 (Rice); U-489 (Goodman); P-947 and U-489 (Middleton); U-248 at 36-37, 39 (Allen), 36-41 (Robinson), 43-45, 47-48 (Peters-Dixon), 43, 45-48 (Washington), 54 (Cook), 57 (second Clark complaint).

(1) (1)

Nos. 85-1626 and 85-2010

Supreme Court, U.S.
FILED
FEB 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES GOODMAN, ET AL., PETITIONERS

v.

LUKENS STEEL COMPANY, ET AL.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL., PETITIONERS

v.

CHARLES GOODMAN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a labor union can be held liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or 42 U.S.C. 1981 on the ground that it has passively acquiesced in the employer's discrimination by the manner in which it has handled grievances.

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1 A. Larson & L. Larson, *Employment Discrimination* (1985) 12, 14, 23

Note, *Union Liability for Employer Discrimination,* 93 Harv. L. Rev. 702 (1980) 13, 21, 23

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1626

CHARLES GOODMAN, ET AL., PETITIONERS

v.

LUKENS STEEL COMPANY, ET AL.

No. 85-2010

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL., PETITIONERS

v.

CHARLES GOODMAN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has responsibility for enforcing statutes prohibiting discrimination in employment on account of race. See, *e.g.*, 42 U.S.C. 2000e-5(f). The federal government, as the nation's largest employer, will also be affected by the outcome of this case in its dealings with unions representing federal employees. See 42 U.S.C. 2000e-16.

The United States has no significant interest or particular expertise in the questions presented by the petition in No. 85-1626—*i.e.*, the appropriate period of limitations for actions brought under 42 U.S.C. 1981 and the retrospective application of *Wilson* v. *Garcia*, 471 U.S. 261 (1985)—and accordingly we will not address those issues in this brief.

STATEMENT

1. The plaintiffs in this case are seven black employees or former employees of Lukens Steel Company ("Lukens"), and the United Political Action Committee of Chester County. They represent the class of all blacks who have been employed by Lukens since June 14, 1967. The defendant unions, the United Steelworkers of America and two of its locals, Local 1165 and Local 2295, are the certified collective bargaining agents of Lukens' hourly employees. This action was filed in July 1973, alleging inter alia that Lukens had discriminated against plaintiffs with respect to wages, promotions, transfers, discipline, testing, discharges of probationary employees, and workplace environment, all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, or 42 U.S.C. 1981. The unions were also alleged to have been liable for violations of these statutes. Pet. App.[1] 5a-6a, 56a, 59a-61a.[2] Of particular relevance to this case is plaintiffs' allegation that the unions violated Title VII by "[f]ailing to fairly and adequately process grievances on behalf of black employees"; "[f]ailing to represent black persons effectively by passively permitting the employer to discriminate against black persons"; and "[f]ailing to act affirmatively to cause the employer to refrain from discriminating against black employees" (J.A. 7).

The case was tried in 1980. See J.A. 1-2. In February 1984, the district court issued findings of fact and conclusions of law, holding that plaintiffs had proven some but not all of their claims. Pet. App. 50a-150a; see also *id.* at 5a-6a.

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[1] Pet. App. citations refer to the petition filed in No. 85-2010.

[2] Local 2295 has about 80 members, and since 1967 has never had more than 12 black members. Local 1165 has about 2,600 members, of whom about 25% are black. Blacks have been active in this local. Pet. App. 133a.

a. With respect to the unions, the district court found that the departmental seniority system was created and maintained by the unions and Lukens in good faith, and that both black and white employees overwhelmingly preferred it to a plant-wide system. Blacks participated actively in negotiating the collective bargaining agreements that embodied this system, and never suggested a change in it. Pet. App. 71a.

The district court also found that while there were deficiencies in the way the unions processed employees' grievances, there was no proof that this resulted in any greater disadvantage to blacks than to whites. The deficiencies were apparently created at least in part by the volume of grievances—about 8,000 were filed during the limitations period (which the district court held to have run from April 7, 1971, onwards under Title VII, and from July 15, 1967, onwards under Section 1981 (Pet. App. 58a)). The number of grievances steadily increased each year, resulting in a backlog. To meet this problem, the unions gave priority to certain grievances, *i.e.*, those that involved a discharge or a suspension lasting more than four days. Of the grievances which were processed through to arbitration, those asserted on behalf of black members were proportionate to their numbers in the workforce. Black grievants had a higher success rate than whites in arbitrated complaints. *Id.* at 135a-137a; see also *id.* at 93a-94a, 101a.

Indeed, the district court found that the unions had objected to certain discriminatory practices by the company. For instance, in 1968, the unions protested during collective bargaining negotiations against Lukens' continued use of the Wonderlic Test for screening promotions—a practice that the district court found to have had a racially disparate impact that was not defensible as job-related.[3]

[3] The district court found that "company representatives dismissed the challenge as being asserted merely on behalf of 'minorities.' " Pet. App. 90a.

And it was found probable that the unions' use of the grievance procedure protected nonprobationary employees from discriminatory discharges. Pet. App. 90a, 101a.

b. The district court did, however, find some *inaction* by the unions to be grounds for liability, on the theory that "mere union passivity in the face of employer-discrimination renders the unions liable under Title VII and, if racial animus is properly inferrable, under § 1981 as well" (Pet. App. 139a). The condemned inaction was found in the unions' "failures, during the limitations period, to include racial discrimination as a basis for grievances or other complaints against the company" (*id.* at 137a). In this connection, the court made three findings.

First, the court found that the unions had a uniform policy of not filing grievances on behalf of probationary employees, for any reason (Pet. App. 137a). And, concluded the court, "[t]he union knew that blacks were being discharged by Lukens at a disproportionately higher rate than whites" (*ibid.* (citations omitted)).[4]

Second, while the unions objected to Lukens' use of all types of tests, they did not base the objections on the tests' racially disparate impact, although they were "chargeable with knowledge" of the disparity (Pet. App. 137a).

Third, the unions had decided not to assert racial discrimination as the basis for grievances generally, although apparently they would process such complaints on other grounds (Pet. App. 138a; but cf. J.A. 731-732). The unions argued that this policy was a tactical response

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[4] The unions argued in the court of appeals that prior to 1974 they had not believed that they had a right to file grievances on behalf of probationary employees, and that after 1974 there were relatively few discharges of probationary employees. Unions' C.A. Br. 53-57. The district court did not dispute the date of most of the discharges (Pet. App. 103a; see also *id.* at 101a), but it did conclude that the unions should have challenged pre-1974 racial discharges (*id.* at 137a).

to Lukens' reluctance to admit discriminatory practices; the district court also found that the company "preferred to avoid confronting racial issues if at all possible" (Pet. App. 119a). Nonetheless, the court rejected this justification, on the grounds that racial harassment grievances could not be recast and because "[t]he clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment" (*id.* at 138a).[5]

Accordingly, the district court enjoined the unions from "failing to challenge discriminatory discharges of probationary employees" (Pet. App. 155a), "failing or refusing to assert meritorious claims of racial discrimination" (*id.* at 157a), and "tolerating or giving tacit encouragement to racial harassment" (*id.* at 158a).

2. The court of appeals affirmed the district court on the issue of the unions' liability. The court listed the relevant provisions of Title VII as Sections 703(c)(1) and (3), 42 U.S.C. 2000e-2(c)(1) and (3).[6] While noting the criticisms that have been made of *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973), the court apparently endorsed "its premise that there is an affirmative duty on the part of the unions to combat discrimination in the workplace" (Pet. App. 25a), and therefore rejected the unions' argument that they had done nothing to "cause" an employer to discriminate under Section 703(c)(3) of Title VII. Further, it stated that "the unions intentionally avoided asserting claims of discrimination," thereby "violat[ing] the duty of fair representation owed to their members" and "the duty to enforce the

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[5] A fourth finding by the district court, that the unions were answerable for Lukens' discriminatory initial assignments, was vacated by the court of appeals. No plaintiff adequately represented the class on this claim. Pet. App. 20a.

[6] It did not list Section 703(c)(2), 42 U.S.C. 2000e-2(c)(2), as relevant.

collective bargaining agreement" (Pet. App. 26a (citations omitted)); this violated Section 703(c)(1) of Title VII, too, the court continued, because by their policy the unions "discriminated against the victims who were entitled to representation" (Pet. App. 26a). Finally, the court of appeals held that "[t]he district court's finding of intentional discrimination [sic] properly supports the claims under § 1981 as well" (*id.* at 26a-27a).

SUMMARY OF ARGUMENT

I. A. Liability under Title VII conventionally requires a finding of disparate treatment or disparate impact. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 581-582 (1978) (Marshall, J., concurring in part and dissenting in part); *Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15 (1977). Here, the courts below found neither with respect to the unions, and accordingly the finding of liability under Title VII should be reversed.

B. Nor should liability be predicated on an alternative theory resting on the unions' failure to file particular grievances in a particular manner against the *employer's* discrimination. There is no more laudable goal for a union than combatting an employer's racial discrimination. But unions have only finite resources, and to hold them liable under Title VII for failing to give absolute priority to this goal cannot be squared with the language or intent of Title VII, fails to afford unions the flexibility they must have as representative bodies, and is antithetical to the basic principle that one has a duty only to police one's own activities.

II. With regard to the court of appeals' 42 U.S.C. 1981 holding, we think *General Building Contractors Ass'n* v. *Pennsylvania,* 458 U.S. 375 (1982), is dispositive. That decision required discriminatory intent on the part of the defendant, and here there was no finding that the unions had such intent. The fact that the unions deliberately

adopted their grievance policies does not suffice, any more than did the fact that the employer in *General Building Contractors* deliberately adopted its hiring policies, since " '[d]iscriminatory purpose' * * * implies more than intent as volition or intent as awareness of consequences." *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979) (citation omitted).

ARGUMENT

I. THE COURTS BELOW ERRED IN FINDING THE UNIONS LIABLE FOR DISCRIMINATION UNDER TITLE VII

A. Plaintiffs Did Not Establish, And The Courts Below Did Not Find, Conduct By The Unions Amounting To Disparate Treatment Or Resulting In A Disparate Impact On Blacks

Neither of the courts below rested its conclusion of union liability on either of the two theories—disparate treatment or disparate impact—upon which Title VII liability has conventionally been predicated. *Furnco Construction Co.* v. *Waters*, 438 U.S. 567, 581-582 (1978) (Marshall, J., concurring in part and dissenting in part); *Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15 (1977). Nor will the record in this case support liability on either theory with respect to the unions.

There was no finding of intentional discrimination by the district court, and no basis on which such a finding could have been supported. While the court of appeals referred to the district court's finding that "the unions intentionally avoided asserting claims of discrimination," the unions' "deliberate choice not to process grievances," and "[t]he district court's finding of intentional discrimination" (Pet. App. 26a-27a), such statements are in context completely ambiguous. The unions' policies certainly were "intentional" and "deliberate" in the sense of being advertent. It does not, however, follow that they were motivated by racial animus. See *Personnel Admin-*

istrator v. *Feeney*, 442 U.S. 256, 279 (1979) (citation omitted) (" 'Discriminatory purpose' * * * implies more than intent as volition or intent as awareness of consequences").

The district court's more specific findings do not suggest that racial animus existed. The court found objectionable the unions' policy "to intentionally avoid[] asserting discrimination claims * * * regardless of whether, as a subjective matter, [the unions'] leaders were favorably disposed toward minorities" (Pet. App. 139a-140a), and its policy of not bringing grievances on behalf of probationary employees even though "[t]he union[s] knew that [black probationary employees] were being discharged by Lukens at a disproportionately higher rate than whites" (*id.* at 137a). But these policies applied equally to black and white employees and thus cannot constitute a case of disparate treatment. While the district court used the words "racial animus" in finding liability under Section 1981 (Pet. App. 138a), we think it plain that such a label was misapplied to decisions made on tactical grounds and lacking any hint of discriminatory motive focused on the race of the claimant.

There is likewise nothing in the record on which to base a finding of disparate impact against the unions, a hypothesis which has heretofore gone virtually unmentioned by the parties and the courts below.[7] With respect

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[7] The district court stated that the plaintiffs had made both disparate impact and disparate treatment claims (Pet. App. 51a), but it generally did not distinguish between claims made against the company and claims made against the union, nor between claims premised on one theory rather than the other. In fact, the plaintiffs apparently pleaded only that the transfer and seniority provisions of the collective bargaining agreements negotiated by the unions – a quite different set of issues – gave rise to racial disparities; they clearly did not allege that

to the employer's tests, the district court pointed out that the unions *did* oppose the use of the tests (Pet. App. 137a)—apparently with some success (see J.A. 331-332, 653-654, 702)—and the court did not suggest that the unions would have been more successful in their opposition had it been based on racial grounds. As to the policy against bringing grievances on behalf of probationary employees, and the failure to pursue racial harassment claims raising no other violation of the contract, there was simply no finding regarding the effects of those policies on any particular racial group. With regard to the handling of grievances in all other respects, the district court found evidence of discrimination "inconclusive," and found that there was "no hard evidence to support an inference that [the unions'] inadequacies [in processing grievances] disadvantage blacks to a greater extent than whites" (Pet. App. 135a; see also *id.* at 93a-94a, 101a). The court of appeals noted the district court's conclusion that "the plaintiffs had failed to present adequate proof of discrimination" regarding "[p]rocessing grievances by the

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any of the union practices on which liability was ultimately found gave rise to a disparate impact. See 6/14/73 Complaint—Class Action ¶¶ 48-49.

Indeed, had disparate impact analysis been at issue in the district court, serious questions concerning the role of certain defenses would have been explored. The limiting doctrine of "business"—here, "union"—"necessity" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971)) would certainly be applicable, though likely to differ in some respects from business-necessity. Such a defense seems especially plausible here, where tactics, backlog, and limited resources of the unions appear to support their decision to bring certain grievances, and in certain ways. The possibility that certain actions may be justifiable pursuant to a bona fide seniority system also must be recognized and seems potentially relevant with respect to the policy of disfavoring probationary employees with respect to grievances. See *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 239 (1982); *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598 (1980). See also *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979).

unions insofar as the complaints centered on the number of grievances which the locals presented initially and pursued through arbitration" (*id.* at 6a). Indeed, the district court further observed that as to grievances reaching arbitration, success was achieved by black employees at a rate 50 percent higher than achieved by whites (*id.* at 136a).

Since neither disparate treatment nor disparate impact was proven or found to exist by either of the courts below, liability can only be justified on some alternative theory.[8] That theory rests on the unions' perceived failure vigorously and successfully to pursue, using the terminology of racial discrimination, complaints of discrimination by the employer. Such a theory of liability, based on passive acquiescence in discrimination by the employer, is without precedent in the decisions of this

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[8] Plaintiffs might have argued in the courts below that the unions' failure to bring grievances on behalf of probationary employees, and their alleged failure to pursue in any way certain racial harassment claims, gave rise to Title VII liability on the part of the unions because that conduct had a disparate impact on black employees (as discussed, the opinions of the courts below make clear that there was no disparate impact on blacks resulting from the way in which the unions pursued individual non-harassment grievances (Pet. App. 135a-137a)). It is conceivable, though not clear on the record, that these policies may have had an impact on blacks more adverse than on members of other racial groups. We stress again, however, that such a theory was neither advanced by the plaintiffs in their complaint nor presented in the form of evidence or argument at trial. Because the theory was at no time asserted, no defenses to it were articulated or established by the unions. The issue not having been raised by the parties, it properly played no part in the decisions of the trial and appellate courts. As a general proposition, this Court has made clear its reluctance to consider alternative theories of Title VII liability which were in no way dealt with in the courts below. *Furnco Construction Corp.* v. *Waters,* 438 U.S. at 580-581. In any event, the issue is certainly of sufficient difficulty that it should be considered by this Court only in a case which has had full litigation and consideration in the lower courts.

Court,[9] though it has appeared in the jurisprudence of the lower courts.[10] It is without basis in Title VII, and for that reason the decision of the court below must be reversed.

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[9] This Court has not heretofore addressed the Title VII question at issue here. The court of appeals, however, seems to have thought that the decision in *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), was relevant, saying that it rejected "the union's defense that in representing a number of employees it is sometimes necessary to compromise the grievance of one" (Pet. App. 26a). *McDonald* does not, however, endorse the proposition that a union may *never* compromise one employee's grievance for the sake of others' grievances; such a rule would make it impossible for a union to represent any grievants at all. Nor does *McDonald* create union liability for an *employer's* practices. The most that *McDonald* can be construed to say is that a union is liable to employees under Title VII if the union itself intentionally discriminates against them—for example, if the union negotiates penalties from the employer that take account of the employees' race, and that differ in severity along explicitly racial lines. 427 U.S. at 284-285. It is undisputed that such intentional discrimination would breach Title VII; that is, however, not the present case.

[10] For instance, the leading case of *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973), spoke of "union passivity" and "affirmative union obligation under Title VII." *Chrapliwy* v. *Uniroyal, Inc.*, 458 F. Supp. 252, 282-283 (N.D. Ind. 1977), adopted *Macklin's* approach, adding that union "action [against the employer's sex discrimination] must be initiated whether or not a female employee complains to the Union of discriminatory treatment" (citation omitted). *Dickerson* v. *United States Steel Corp.*, 439 F. Supp. 55, 62 (E.D. Pa. 1977), later proceeding, 472 F. Supp. 1304, 1353 n.41 (1979), vacated and remanded on other grounds *sub nom. Worthy* v. *United States Steel Corp.*, 616 F.2d 698 (3d Cir. 1980), spoke in terms of "vicarious liability." In *Terrell* v. *United States Pipe & Foundry Co.*, 644 F.2d 1112, 1120 (5th Cir. 1981), vacated on other grounds, 456 U.S. 955, cert. denied, 456 U.S. 972 (1982), the court said that unions have the "legal requirement of taking every reasonable step to bring employment practices into compliance with the law." Another court has said that unions must "insure [employer] compliance" with Title VII. *Romero* v. *Union Pac. R.R.*, 615 F.2d 1303, 1310-1311 (10th Cir. 1980). A diverging line of authority, truer to the language and intent of Title VII, apparently holds that a union is implicated in an employer's violations only if the union

B. Unions Are Not Liable Under Title VII Merely For Failing To Take Affirmative Steps To Combat Discrimination By The Employer

There is no more laudable goal for a union than combatting an employer's racial discrimination. But unions have only finite resources, and to hold them liable under Title VII for failing to give absolute priority to this goal cannot be squared with the language or intent of Title VII, fails to afford unions the flexibility they must have as representative bodies, and is antithetical to the basic principle that one has a duty only to police one's own activities.

1. Title VII deals separately with the liability of unions as distinct from employers (Section 703(c), 42 U.S.C. 2000e-2(c)):

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

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itself treated similarly situated employees differently on racial (or other prohibited) grounds. See, *e.g.*, *Babrocky* v. *Jewel Food Co. & Retail Meatcutters Union*, 773 F.2d 857, 868 (7th Cir. 1985); *Tate* v. *Weyerhaeuser Co.*, 723 F.2d 598, 606-607 (8th Cir. 1983), cert. denied, 469 U.S. 847 (1984); *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 424-426 (6th Cir. 1974). One commentator has noted that "[m]ost courts * * * appear to rely upon previous decisions for the proposition that acquiescence alone can produce liability, with little attention to the statute, so that the proposition survives as much on the strength of repetition as on careful analysis." And *Macklin*, the decision most "rel[ied] upon," "provides an infirm base upon which to found a proposition of law, and it quite possibly states a broader rule than is necessary." 1 A. Larson & L. Larson, *Employment Discrimination* § 44.42, at 9-27 to 9-28 (1985).

> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
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> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

On its face, this language appears to present a prohibition against various discriminatory acts by a union. One looks in vain for admonitions of affirmative duty to combat or prevent someone else's discriminatory conduct, or any suggestion that union liability could be predicated on such grounds.[11] Though Sections 703(c)(1) and (2), dealing with unions' liability, contain catch-all phrases such as "or otherwise to discriminate," the structure of Section 703(c) suggests that 703(c)(1) and (2) focus on matters of membership and on internal union affairs, while it is Section 703(c)(3) which most specifically addresses the interaction between the union's conduct and the conduct of the employer. See Note, *Union Liability for Employer Discrimination,* 93 Harv. L. Rev. 702, 721 (1980). And that provision clearly states that it is only when a union "cause[s] or attempt[s] to cause" an employer's discrimination that it is liable. Moreover, Section 703(c)(3) was taken

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[11] It is also instructive to examine a statutory model creating vicarious liability for a failure or refusal to act that Congress chose *not* to follow in framing Section 703(c). That statute, 42 U.S.C. 1986, imposes liability on every person who, "having knowledge" that Section 1985 violations are to be committed, and "having power to prevent or aid in preventing the[m]," "neglects or refuses to do so, if such wrongful act be committed."

in haec verba from the National Labor Relations Act, 29 U.S.C. 158(b)(2) (Section 8(b)(2) of the NLRA), and this section had already been given a "restricted" meaning by the courts, narrower even than "to induce" or "to encourage." *Electrical Workers* v. *NLRB,* 341 U.S. 694, 703 (1951); see also *NLRB* v. *Teamsters,* 317 F.2d 746, 749 (2d Cir. 1963) ("suggestion" or "compulsion"); *NLRB* v. *Jarka Corp. of Philadelphia,* 198 F.2d 618, 621 (3d Cir. 1952). "To say that the union 'causes' employer discrimination simply by allowing it is to stretch the meaning of the word beyond its limits." 1 Larson, *supra,* § 44.50, at 9-40. Cf. *Monell* v. *New York City Dep't of Social Services,* 436 U.S. 658, 691-692 (1978).

2. The legislative history confirms that Congress did not intend to expand a union's responsibility for the employer's wrongdoing. As a general matter, of course, the Congress which passed Title VII insisted that " 'management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.' " *United Steelworkers* v. *Weber,* 443 U.S. 193, 206 (1979) (quoting H.R. Rep. 914, 88th Cong., 1st Sess., Pt. 2, at 29 (1963)). On other occasions, this Court has cautioned against reading Title VII so expansively that the rest of the labor statutory scheme is disrupted. See, *e.g., Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50, 69 (1975); *TWA* v. *Hardison,* 432 U.S. 63, 79 (1977); cf. *W.R. Grace & Co.* v. *Rubber Workers,* 461 U.S. 757, 771 (1983).

During the lengthy Senate debate, the bill was criticized by Senator Hill as a threat to the labor movement because "all of the rights which a union has under the National Labor Relations Act [NLRA] or the Railway Labor Act could be suspended." 110 Cong. Rec. 487 (1964). Senator Clark, one of the two bipartisan floor managers of Title

VII, made a detailed reply to these objections on April 8, 1964.[12] Clark had requested the Department of Justice to prepare a memorandum rebutting Hill's arguments; during his reply to the criticisms he placed this memorandum in the record. The memorandum stated (110 Cong. Rec. 7206-7207) that "[n]othing in title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act" and that "title VII would have no effect on the duties of any employer or labor organization under the NLRA or under the Railway Labor Act, and these duties would continue to be enforced as they are now." Under the labor laws existing at that time unions had a "duty of fair representation," forbidding them from engaging in discrimination, inter alia, on the basis of race. See *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Wallace Corp.* v. *NLRB,* 323 U.S. 248 (1944); *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953). In *Humphrey* v. *Moore,* 375 U.S. 335 (1964), handed down on January 6, 1964, nine days before Senator Hill claimed that Title VII would impliedly repeal unions' statutory rights, the Court dealt with the scope of a union's "duty of fair representation" arising under Section 9(a) of the National Labor Relations Act, 29 U.S.C. 159(a), and emphasized the breadth of discretion allowed to unions under national labor policy. It reaffirmed that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion" (375 U.S. at 349, quoting *Ford Motor Co.* v. *Huffman,* 345 U.S. at 338), and added (375 U.S. at 349-350):

> Just as a union must be free to sift out wholly frivolous grievances which would only clog the griev-

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[12] Senator Clark also chaired the subcommittee of the Senate Labor and Public Welfare Committee that had held hearings on the bill and that brought it to the Senate floor.

> ance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

The Court ruled that the union had not breached its duty of fair representation because it "took its position honestly, in good faith and without hostility or arbitrary discrimination" (*id.* at 350).[13] Thus, there is no reason to suppose that Congress intended Title VII to create a broad, new union duty to grieve employer misconduct.

It would, of course, have been remarkable if Congress had intended to visit liability for an employer's discrimination on the union, or vice versa. Employers and unions "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest" (*General Building Contractors Ass'n* v. *Pennsylvania,* 458 U.S. 375, 394 (1982), quoting *NLRB* v. *Insurance Agents,* 361 U.S. 477, 488 (1960)). It is, therefore, unsurprising to find the

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[13] Under post-1964 case law, and most notably under the leading case of *Vaca* v. *Sipes,* 386 U.S. 171, 190 (1967), a breach of the NLRA's duty of fair representation "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith" (citations omitted). Indeed, this Court has indicated that a breach requires "deliberate and severely hostile and irrational treatment." *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 301 (1971).

In this case, of course, plaintiffs have not alleged a violation of Section 9(a), 29 U.S.C. 159(a), which is the statutory source of the duty of fair representation.

following exchange in the Senate debate on Title VII (110 Cong. Rec. 7217 (1964) (emphasis added)):

> [Sen. Dirksen:] If an employer obtains his employees from a union hiring hall through operation of his labor contract, is he in fact the true employer from the standpoint of discrimination because of race, color, religion, or national origin when he exercises no choice in their selection? *If the hiring hall sends only white males, is the employer guilty of discrimination* within the meaning of this title? If he is not, then further safeguards must be provided to protect him from endless prosecution under the authority of this title.
>
> [Sen. Clark:] An employer who obtains his employees from a union hiring hall through operation of a labor contract is still an employer. *If the hiring hall discriminates against Negroes, and sends him only whites, he is not guilty of discrimination—but the union hiring hall would be.*

Cf. *General Building Contractors Ass'n* v. *Pennsylvania, supra; Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 (1981) (employer has no right of contribution from union for former's liability under Title VII for discriminatory wage differentials collectively bargained for). If, under Title VII, an employer cannot be held liable for failing to identify and counteract union discrimination in the referral of employees, there can be little basis for holding a union liable when it fails to take affirmative measures to combat an employer's discrimination.

This conclusion is reinforced by the absence of any contrary suggestion in the lengthy debate concerning the manner in which Title VII would be enforced, the resolution of which was critical to the enactment of the 1964 Civil Rights Act. See 110 Cong. Rec. 12595-12596 (1964) (remarks of Sen. Clark). Senator Humphrey stated that the Senate's changes in the House bill were "concerned

chiefly with procedures for enforcement" (*id.* at 12707). Yet apparently no one, either friend or foe of the bill, suggested that Title VII would impose significant enforcement responsibilities on unions. Nor did Congress say that the unions' "duty of fair representation" was to be expanded. Rather, Congress clearly left the task of enforcement to private plaintiffs and specified governmental bodies and did not contemplate implied rights of action against nonviolators. See *Northwest Airlines, Inc.* v. *Transport Workers,* 451 U.S. at 93-94 (footnote omitted) ("The comprehensive character of the remedial scheme fashioned by Congress [in Title VII] strongly evidences an intent not to authorize additional remedies"); *NAACP* v. *FPC,* 425 U.S. 662 (1976). It is therefore apparent from the language and legislative history of Title VII that unions were to retain their freedoms and prerogatives to the extent consistent with their duty not to discriminate.[14]

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[14] The passive acquiescence theory adopted by the courts below could be applied with equal facility and no less justification to a whole array of federal statutes. If, for instance, an employer has violated employees' statutory rights under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 *et seq.*, then unions might be held liable to the extent that they had failed to protest or to protest effectively. The Equal Pay Act, 29 U.S.C. 206(d), the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, and other federal statutes designed to benefit employees could also be read to imply causes of action against unions for failure to aid in preventing employers' violations. Unions would become all-purpose enforcement agencies for the entire array of employees' statutory rights, with respect not only to employer discrimination, but also to hazardous working conditions, job-related diseases, pension funds, wages and hours, and so on.

Such a radical conception of the union's obligations would burden the collective bargaining process, require unions to expend substantial resources monitoring employers, expose them to the risk of severe financial liabilities, and displace existing enforcement mechanisms. And such a sweeping reordering of roles and priorities surely requires an unequivocal mandate from Congress. See *Rosen* v. *Hotel & Restaurant Employees,* 637 F.2d 592, 599 n.10 (3d Cir.), cert. denied,

And thus their discretion over the grievance process, subject to the command that they not discriminate, was intended to remain extensive.[15]

3. The court of appeals would here impose liability on the unions in a distinct set of circumstances: where the unions at most made deliberate but good faith tactical decisions as to how much, in which cases, and by what arguments they would challenge allegations of discrimination by the employer, discrimination to which they had not become a party by, for instance, signing a collective bargaining agreement with provisions sanctioning or mandating discrimination. This Court has never imposed liability on a union in this sort of case, even on a more familiar disparate impact theory. We submit that imposing liability on the union here would have significant and unexpected implications once it is appreciated what is distinctive about a union acting in this kind of a representative capacity.

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454 U.S. 898 (1981) (denying union's ERISA liability for "failure to oversee" employer); *Bryant* v. *United Mine Workers*, 467 F.2d 1, 6 (6th Cir. 1972), cert. denied, 410 U.S. 930 (1973) (denying union liability for mine operators' failure to comply with Federal Mine Safety Code standards).

[15] Indeed, to avoid Title VII liability under an "affirmative duty" standard, unions would have to press for employers' recognition of the statutory rights of individuals, although Congress conceived of those rights as independent of the collective bargaining process. See, *e.g.*, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). And in order to ensure those rights, unions would have to sacrifice their bargaining advantages on other negotiating fronts, leaving them—and the employees they represented—in a weaker position overall in dealing with management. Ironically, the more discriminatory an employer's conduct, the more a union would have to concentrate its demands on the issue of discrimination, and the weaker it would be in all other bargaining areas. Congress clearly did not mean to force unions (and thus employees) to seek, as a mere concession from employers and in exchange for concessions on their part, what it chose to vest in employees as an indefeasible legal right.

The unique functions unions perform must be kept in view when considering the Title VII liability to which they may be subject. As we have argued, the statute itself recognizes such a distinct role, dealing with the union's liability in Section 703(c) and the employer's liability in Section 703(a), 42 U.S.C. 2000e-2(a). Further, this inference from the statutory scheme not only cautions against some of the more expansive theories of union liability, tending as they do to a theory of vicarious liability,[16] it invites attention to the differing role and nature of employers and unions. Except when the union is itself an employer (see 42 U.S.C. 2000e(a) and (b)) or when it in effect takes over employment decisions for an employer (see *General Building Contractors, supra*), a union exists to represent the bargaining unit employees' interests and to press their claims with the employer. A labor union under the scheme of the national labor laws is a democratically controlled, representative institution, compelled by law to reflect the will of its constituents subject to the duty of fair representation of all in the bargaining unit. An employer, by contrast, has an altogether different relation to his employees. They are not his constituents but rather his agents and instruments.

In these respects a union is more like a limited purpose governmental unit in its relations with its members. *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. at 202 ("Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. *J.I. Case Co.* v. *Labor Board,* [321 U.S.

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[16] We would note that holding a union liable under a disparate impact theory in a case like this one—where the union has done nothing but fail to challenge (with some unspecified measure of insistence and success) an *employer's* discrimination—looks very much like the "passive acquiescence" standard which, as we discussed earlier, is inconsistent with the language and intent of Title VII.

332, 335 (1944)], but it has also imposed on the representative a corresponding duty"); see also *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967). Of course, like a governmental unit, if a union intentionally discriminates it is rightly subject to liability and sanctions. See Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 721 (1980) (footnote omitted) ("A union's passivity violates [Section 703(c)(1)] only if its intent in remaining inactive was to discriminate"). And when a government (or a union) acts as an employer it is subject to the same disparate impact analysis as other employers. *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). But this Court has declined to subject governments to liability under more expansive theories of liability in their governmental functions: a representative entity must always balance and order the various claims and interests of those whom it represents. Cf. *Alexander* v. *Choate*, 469 U.S. 287, 306-309 (1985); *Personnel Administrator* v. *Feeney*, *supra*; *Washington* v. *Davis*, 426 U.S. 229, 246-248 (1976); *Jefferson* v. *Hackney*, 406 U.S. 535, 549-551 (1972). A union's allocation of time, resources, or political capital to one set of claims necessarily subtracts from what is available to competing claims and interests, and Congress in Title VII did not seek to impose any particular set of priorities on labor unions, or to require that certain claimants get preferential treatment. Cf. *Wimberly* v. *Labor & Industrial Relations Comm'n*, No. 85-129 (Jan. 21, 1987), slip op. 5-6. Combatting discrimination is an important union goal, but so is seeking a safe and healthy workplace environment; unemployment, accident, and sickness coverage; and higher wages. "The complete satisfaction of all who are represented is hardly to be expected," and a "[w]ide range of reasonableness must be allowed a statutory bargaining representative." *Ford*

Motor Co. v. *Huffman,* 345 U.S. at 338; see also *Barrentine* v. *Arkansas-Best Freight System,* 450 U.S. 728, 742 (1981). Thus, Congress did not contemplate an open-ended mandate to courts to determine when a union, acting consistently with its NLRA duty of fair representation and with no racial animus, has or has not given the claims and grievances of its minority members just the right amount and just the right kind of attention.

As this Court discussed in *Electrical Workers* v. *Foust,* 442 U.S. 42, 48-52 (1979), unions must be afforded flexibility in their grievance actions. In declining to allow a member to receive punitive damages where the union missed a grievance filing deadline, the Court stressed the same factors which are most relevant here: "an employee can recover in full from his employer" (*id.* at 49); awards against unions "could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents" (*id.* at 50-51) and "curtail[ing] the broad discretion that *Vaca* afforded unions in handling grievances" (*id.* at 51); if the unions are held liable, they "might feel compelled to process frivolous claims or resist fair settlements" (*id.* at 52); thus, "[a]bsent clear congressional guidance, we decline to inject such an element of uncertainty into union decisions regarding their representative functions" (*ibid.*). See also *NLRB* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. at 180.

To be sure, unions have been held to a duty of fair representation under Section 9(a) of the NLRA, 29 U.S.C. 159(a), but that duty recognizes that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.* v. *Huffman,* 345 U.S. at 338; see also *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 301 (1971) (breach of duty requires "deliberate and severely hostile and irrational treat-

ment"); *Vaca* v. *Sipes*, 386 U.S. at 190 (breach if treatment is "arbitrary, discriminatory, or in bad faith"). The terms of the duty of fair representation are different and less intrusive upon the union's performance of its representative function than would be theories that imposed liability on a union for failing to neutralize an employer's discrimination, theories which would threaten to subvert the very wide discretion for good faith conduct which this Court has found to be appropriate.[17]

Further, although the union's status as exclusive bargaining agent for all the employees of a bargaining unit in general forces individuals or groups of individuals to pursue their claims and grievances exclusively through the union—*Emporium Capwell Co.* v. *Western Addition Community Organization, supra; J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 338-339 (1944)—it has been clearly

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[17] The court of appeals stated that "the district court found that the unions intentionally avoided asserting claims of discrimination. In so doing the unions violated the duty of fair representation owed to their members" (Pet. App. 27a). There, indeed, is confusion compounded. First, the odd phrase "intentionally avoided asserting claims" of course conceals the fact that no more was proved than that there was a knowing tactical choice to press such claims, but not in terms of racial discrimination. See pages 7-8, *supra*. There is no finding of an improper motive for this choice. Second, such tactical choices by no means rise to the level of, for example, "deliberate and severely hostile and irrational treatment" required to support an action for breach of the duty of fair representation. Third, it is not at all clear what the relevance to a Title VII action of such a breach of another statutory duty would be, even if it had been pleaded (it was not) or were remotely within the range of proof. Compare *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. at 70-73 (Title VII violation does not establish NLRA violation); *Alexander* v. *Gardner-Denver Co., supra;* see generally 1 Larson, *supra*, § 44.20, at 9-18 to 9-22, § 44.50, at 9-40; Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 719-724 (1980); pages 14-16, *supra*.

established that Title VII claims may be brought outside the usual union representational route by individuals and groups who choose to do so, consulting only their own interests. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). And this would strongly suggest that an extension of doctrine which would in effect compel the union to bring such claims with some unspecified measure of priority not only was not contemplated in the overall scheme of the labor laws; it is quite unnecessary.

4. Finally, any theory of liability which would impose Title VII liability on a union in circumstances such as those in this case would conflict with the basic principle that one is liable only for one's own misdeeds, not for those of another; there is, in other words, generally no affirmative duty to stop another from violating the law. This Court has already applied this principle in *General Building Contractors Ass'n* v. *Pennsylvania, supra,* discussed in the next section. The language of Section 1981 "does not speak in terms of duties," and the statute does not impose an "affirmative obligation," to guarantee minority rights "as against third parties who would infringe them"; rather, it requires only that persons themselves "refrain from intentionally denying blacks" their rights under the statute (458 U.S. at 396). The principle has also been applied in several cases brought under 42 U.S.C. 1983. *Polk County* v. *Dodson,* 454 U.S. 321, 326 (1981) ("official policy must be 'the moving force of the constitutional violation' " in order to establish Section 1983 liability, quoting *Monell* v. *New York City Dep't of Social Services,* 436 U.S. at 694); *Rizzo* v. *Goode,* 423 U.S. 362, 376 (1976) (positing a "duty" to eliminate constitutional violations for those who played no affirmative part in committing them and a "right" for others to have this duty performed "blurs accepted usages and meanings in the English language in a way which would be inconsistent with the words Congress chose in Section 1983");

Monell, 436 U.S. at 691-692 ("language cannot be easily read to impose liability vicariously" where Congress "specifically provide[d] that A's tort became B's liability if B 'caused' A to subject another to a tort"). The clear distinction drawn between union liability and employer liability in Title VII, and Congress's desire to maintain the well-established division of rights and responsibilities between the two, indicates that this principle—of responsibility only for one's own actions—should apply a fortiori to Title VII.[18]

II. THE COURTS BELOW ERRED IN FINDING THE UNIONS LIABLE UNDER 42 U.S.C. 1981

Insofar as the decision of the lower courts is based on Section 1981, it conflicts with this Court's holding in *General Building Contractors Ass'n* v. *Pennsylvania, supra.* In that case, a union discriminated against blacks in its referrals to employers from a union-operated hiring hall. The employers in the case had agreed to hire only on the basis of the union's referrals. No claim was made that the employers had themselves discriminated; nonetheless, the lower courts had held them vicariously liable for the union's discrimination, on the ground that they had "a

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[18] The Court made a "cf." cite to *Furnco Construction Co.* v. *Waters,* 438 U.S. at 577-578, a Title VII case, in *General Building Contractors* for the proposition that, in passing Section 1981, Congress "did not intend to make [employers] the guarantors of the workers' rights as against third parties who would infringe them" (458 U.S. at 396). And in *Teamsters* v. *United States,* 431 U.S. 324, 353 (1977), this Court said it "would be a perversion of congressional purpose" in passing Title VII to "place an affirmative obligation on the parties to a seniority agreement to subordinate those rights in favor of the claims of pre-Act discriminatees without seniority." See also *Carpenters Local 46* v. *Eldredge,* 459 U.S. 917, 921-922 (1982) (Rehnquist, J., dissenting from denial of certiorari).

'duty to see that discrimination does not take place in the selection of [their] workforce,' regardless of where the discrimination originates." 458 U.S. at 392.[19]

This Court reversed, holding that Section 1981 is violated only by "purposeful discrimination," *i.e.*, by "racially motivated" actions or "blatant deprivations of civil rights, clearly fashioned with the purpose of oppressi[on]." 458 U.S. at 388, 391. The employers were held to have no affirmative obligation to protect those against whom the union discriminated, since they were not "the guarantors of workers' rights as against third parties who would infringe them" (*id.* at 396); intentional discrimination of the kind required under Section 1981 could not be proved by showing that the employers had "failed to ensure" nondiscriminatory employment opportunities (*id.* at 397). This Court has since reaffirmed that "[u]nder [Section 1981] relief is authorized only when there is proof or admission of intentional discrimination." *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 583 n.16 (1984) (citing *General Building Contractors*).

In this case the plaintiffs apparently contend that the "intent" requirement of Section 1981 was satisfied by the finding that the unions had intentionally decided not to grieve certain complaints, or to grieve them in certain ways. See Pet. App. 26a. But not every volitional act will provide the requisite intent. For liability to be found, the unions must be shown to have made decisions from racial motives, and no such proof exists here. See *Personnel Administrator* v. *Feeney*, 442 U.S. at 279.[20] Just as employers

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[19] No Title VII claim was brought against the employers. 458 U.S. at 380.

[20] Whether the union knew the employer was discriminating matters only insofar as it bears on the factual determination of whether the union intended its action to be discriminatory (see *Feeney*, 442 U.S. at 279 n.25); because in this case there was no finding of the latter, the presence of the former is at this point legally irrelevant. Here,

are not, under Section 1981, the third party guarantors against union discrimination, so unions should not be guarantors against employers' Section 1981 discriminaton. If the fundamental divergence of interests between union and employer precludes an assumption that the latter is liable for the former's discrimination, no agency relation can be presumed to run the other way either. See 458 U.S. at 391-395; *id.* at 403-404 (O'Connor, J., concurring). Hence the unions here had no duty under Section 1981 to take affirmative steps to end Lukens' discrimination, and their decisions not to file grievances against the employer in some situations cannot have been a breach of duty.

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conversely, both courts below seemed to think it irrelevant whether or not the unions were "favorably disposed toward minorities" (Pet. App. 25a, 140a).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, *et al.*,
Petitioners,

v.

CHARLES GOODMAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTIONS PRESENTED

1. Whether a labor union may be held to have violated Title VII of the Civil Rights Act of 1964 or 42 U.S.C. § 1981 solely because the union failed to make affirmative efforts to stop an employer's discrimination.

2. Whether, if a duty to make such efforts exists under Title VII or Section 1981, a union can be held liable for breach of that duty because in filing grievances against the employer's alleged discriminatory actions, it made the arguments (such as seniority) that it thought best calculated to win the grievances, but those arguments did not include an explicit allegation of race discrimination.

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BRIEF FOR PETITIONERS

This brief is the joint product of the petitioners, United Steelworkers of America, AFL-CIO-CLC, and its Local Unions 1165 and 2295 (referred to herein collectively as "the unions") and the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"). The AFL-CIO shares with the petitioners a belief that the lower courts in this case erred in their interpretation of Title VII of the Civil Rights Act of 1964 and of 42 U.S.C. § 1981, and that the interpretation adopted by the lower courts, if generally followed, would undermine the national labor policy as consistently de-

fined by this Court. The decision of petitioners and the AFL-CIO to file a single brief reflects the identity of their views on the legal issues presented and their desire to minimize the burden on the Court by stating their common position only once.

OPINIONS BELOW

The opinion of the court of appeals is reported at 777 F.2d 113.[1] It is reproduced in the Appendix to the petition as Appendix A (Pet. App. 1a-49a).[2] The district court's findings of fact and conclusions of law are reported at 580 F. Supp. 1114. They are reproduced in the Appendix to the petition for certiorari as Appendix B (Pet. App. 50a-148a). The permanent injunction issued by the district court is unreported. It is reproduced in the Appendix to the petition as Appendix E (Pet. App. 155a-159a).

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[1] In addition to the parties identified in the caption, Lukens Steel Company was a defendant in the district court and an appellant in the court of appeals. Lukens filed a separate petition for certiorari on other issues. *Lukens Steel Co. v. Goodman, et al.*, No. 85-1645. At the request of the parties, the Court entered an order on November 17, 1986, deferring consideration of Lukens' petition due to a proposed settlement between Lukens and the plaintiffs, which had been presented to the district court for approval pursuant to Federal Rule of Civil Procedure 23(e). That settlement was approved by the district court on January 22, 1986. Subject only to a possible appeal from that order by class members objecting to the settlement, Lukens Steel Company will not be a party to further proceedings in this case.

[2] This case has been consolidated for purposes of argument with No. 85-1626, *Goodman, et al. v. Lukens Steel Company, et al.*, which raises only issues pertaining to the statute of limitations. This brief's citations to the petition appendix ("Pet. App.") all refer to the appendix filed with the petition for certiorari in No. 85-2010. A separate petition appendix was filed with the petition in No. 85-1626; it is not cited in this brief. A single consolidated Joint Appendix is being filed for both cases. It consists of two volumes, and is cited in this brief as "JA."

JURISDICTION

The district court issued a permanent injunction against the unions (Pet. App. 155a-159a). On appeal from that injunction, the court of appeals affirmed in major part (Pet. App. 3a, 34a). The court of appeals' judgment was entered on November 13, 1985 (Pet. App. 160a-161a). Timely petitions for rehearing were denied on January 7, 1986 (Pet. App. 162a-167a). By order of Justice Brennan dated March 18, 1986, the time for petitioners to file their petition for certiorari was extended to and including June 6, 1986 (Pet. App. 170a). The petition was filed on June 6, 1986, and the writ of certiorari was granted December 1, 1986. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 2000e-5(f)(3). This court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c), provides:

> It shall be an unlawful employment practice for a labor organization—
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> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
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> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
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> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 1 of the Civil Rights Act of 1866, re-enacted with modifications as Section 16 of the Civil Rights Enforcement Act of 1870, 42 U.S.C. § 1981, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

A. Overview

This is a class action raising claims of employment discrimination in violation of Title VII of the Civil Rights Act of 1964 and of 42 U.S.C. § 1981. The defendants below were Lukens Steel Company ("Lukens" or "the company"), a manufacturer of specialty steels with its main facility in Coatesville, Pennsylvania, and the unions that are the exclusive bargaining representatives for all hourly-paid employees at the Coatesville plant.[3] Those unions are the petitioners here. The plaintiffs, who are respondents in this Court, are seven black employees and former employees of Lukens, and an organization known as the United Political Action Committee of Chester County. The individual plaintiffs were certified by the district court to represent an "across-the-board" class and were allowed to challenge a broad range of employment practices. (*Id.* 16a, 56a). The case was tried to the district court without a jury in 1980.

Plaintiffs asserted only three class-wide claims against the unions: that the seniority system had been negotiated

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[3] The International Union is formally certified as the exclusive bargaining representative. The two local unions act as its agents in performing certain representational functions at the local level. (Pet. App. 132a.)

and maintained for a racially discriminatory purpose; that the unions had discriminated against black employees in the processing of grievances; and that the unions had "passively permit[ted] the employer to discriminate against black persons" and had "[f]ail[ed] to act affirmatively to cause the employer to refrain from discriminating against black employees because of their race and color." (I JA 7.) The plaintiffs also alleged that the unions had committed individual acts of discrimination against three of the seven named plaintiffs.

When the district court rendered its decision, the only discrimination that it found was discrimination committed by the company. The district court found no discrimination committed by the unions, either against the class or against individual plaintiffs. The district court held that no discriminatory motive had entered into the negotiation or maintenance of the seniority system. (Pet. App. 70a-71a, 133a.) The court held that plaintiffs had failed to prove any pattern of discrimination by the unions in processing the grievances of black employees. (*Id.* 135a-137a.) The court also rejected all of the individual plaintiffs' claims of discrimination by the unions. (*Id.* 147a-148a.)

The district court nonetheless concluded that the unions had violated both Title VII and § 1981. Its ruling was based entirely on plaintiffs' claim that the unions had "passively permit[ted]" Lukens to discriminate. Indeed, its ruling was even narrower. The district court did not find that the unions had generally failed to oppose Lukens' discriminatory practices; the unions' liability was based solely on a finding of "repeated failures . . . to include racial discrimination as a basis for grievances or other complaints against the company." (*Id.* 137a.) Moreover, the district court did not find that the unions' failure to make express arguments of racial discrimination in grievances was based on a discriminatory motive. On the contrary, the district court credited union officials' testimony that such arguments were unneces-

sary when the grievance could be soundly based on other grounds, and that injecting racial issues tended to interfere with successful resolution of individual employees' grievances. (*Id.* 138a.) The district court concluded, however, that these reasons for not making express arguments of discrimination were "unacceptable" because, in the court's view, grievances filed on other grounds were not equally effective as a means of inducing the employer to change its discriminatory "attitudes." (*Id.*)

On this theory, the district court found the unions liable for their "reluctan[ce]" to make express arguments of race discrimination in grievances generally. (*Id.*) The court also gave, as examples of the unions' failure to make discrimination arguments in grievances, the unions' approach to three particular employer practices that the court had found unlawful. First, with regard to Lukens' use of written tests as a selection device for certain transfers and promotions, the court found that although the unions had objected to the company's testing practices, the grievances that the unions filed did not specifically allege that the tests had a disparate impact on black employees. (*Id.* 137a-138a.) Second, the court found that the unions had failed to file grievances challenging discriminatory discharges of black employees during their probationary periods because of a policy of not filing grievances for probationary employees for any reason. (*Id.* 137a.) And, third, the court found that the unions had failed to file grievances asserting a particular theory of contract violation—a theory that was contrary to the understanding of the parties to the contract—as a means to challenge Lukens' discriminatory initial assignment practices. (*Id.* 138a-139a).

B. The Facts and the District Court's Findings Relevant to Union Liability

1. *The Unions' Reluctance to Assert Explicit Claims of Racial Discrimination in Grievances Generally.* Throughout the period relevant to this case, black em-

ployees constituted approximately 22 to 24 percent of Lukens' hourly workforce (*id.* 60a) and of the local unions' membership (*id.* 132a-133a).[4] The district court found that black members had "actively participated" in local union meetings and affairs (*id.*), as well as in "the negotiations leading to each of the pertinent collective bargaining agreements." (*Id.* 71a.) In addition, undisputed evidence showed that black members had regularly been elected to high union offices. (I JA 180-82, 193-94.) A black member had served as grievance committee chairman—the local union's top grievance-processing official—for more than 5 of the 13 years from 1967 to trial (I JA 207, 224; II JA 714-15.) Black members had also been consistently elected to serve as grievance committeemen and assistant grievance committeemen (II JA 714-715), and had regularly been selected as shop stewards—the front-line representatives in the grievance procedure—in numbers that exceeded their percentage in the bargaining unit (I JA 256-57; II JA 634, 638).

Under the Lukens collective bargaining agreement, disputes over the meaning or application of the agreement are to be resolved through the grievance procedure. If a grievance is not resolved between the company and the unions, it can be arbitrated. Large numbers of grievances are filed, but only a small percentage are taken to arbitration.[5] The undisputed evidence at trial showed, and the district court found, that at both ends of the

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[4] There are two local unions at Lukens, for historical reasons relating to the corporate structure of Lukens. (See Pet. App. 59a.) At all times since World War II, Local 1165 has been substantially larger than Local 2295; at the time of trial, Local 1165 had 2600 members, while Local 2295 had 80 members. (*Id.* 133a.) The percentage of black members is also higher in Local 1165 than in Local 2295. (*Id.*)

[5] In the 5-year period from 1976 through 1980, a total of 1804 grievances were filed. (II JA 489.) In the twelve and a half years from June 1967 through December 1979, only 86 grievances of individual employees were heard in arbitration. (II JA 712.)

process—at the initial filing and in arbitration—the percentage of grievances that the unions prosecuted for black employees equaled or exceeded the percentage of black employees in the bargaining unit.[6] The undisputed evidence also showed that the unions' success rate in arbitration was substantially better for black grievants than for white grievants.[7]

At all times since 1965 the collective bargaining agreement at Lukens has contained a general non-discrimination clause, which provides:

> It is the continuing policy of the Company and the Union that the provisions of this Agreement shall be applied to all employees without regard to race, color, religious creed, national origin, or sex.

(II JA 359.)

Numerous union officials—both black and white, and including some of the plaintiffs' witnesses—testified that it was the unions' policy to try to remedy individual employees' complaints of race discrimination through grievances and other complaints against Lukens. (*E.g.*, I JA 64, 210, 242, 250, 256, 278-79.) Records of grievances introduced as exhibits showed that in a number of cases the unions asserted explicit claims of discrimination on behalf of black employees.[8]

In other instances, where the grievance could be grounded on another provision of the contract, such as the seniority clause, a grievance for a black employee

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[6] Pet. App. 93a, 136a; II JA 489 (25.67% of grievances filed from 1976-1980 were filed on behalf of black employees); II JA 712 (48.8% of all individual grievances arbitrated from 1967-1979 were black employees' grievances).

[7] Pet. App. 136a; II JA 713 (from 1967-1979 grievances were granted in whole or in part in 61.4% of the grievances arbitrated for black employees; the comparable figure for white employees was only 31.8%).

[8] *E.g.*, II JA 411, 415, 418, 422, 424, 434-36, 448-49, 451-54, 491, 532, 604-14, 617, 619, 622, 657, 659, 669, 684, 703, 706-08. *See also* II JA 592-603.

would be filed without an express claim of race discrimination.[9] Union representatives, black and white alike, explained that in their experience an individual grievant is more likely to get what he wants when the grievance is based on some objective requirement of the contract than when the grievance is based on the contractual nondiscrimination clause. When complete relief is available for the grievant under the more specific provision of the contract, "it doesn't add anything to add racial discrimination [to the grievance] as well." (I JA 302. See also *id.* 261-62, 266, 269, 273.) Union officials also testified that Lukens was less willing to settle grievances that included allegations of discrimination, and that the unions could be more successful in getting what the grievant wanted—such as a promotion, or backpay—if they omitted the claim of racial discrimination when there was another contract provision that could provide full satisfaction of the grievance. One witness, who had been a union officer for 30 years, testified as follows:

> Q. In your experience what is the effect of alleging race discrimination in a grievance?
>
> A. You mean just a straight grievance on race discrimination or a grievance involving something else?
>
> For instance, I have had a man say: "Hey, I think they are discriminating against me by not giving me a promotion."
>
> The main thing we are after here is promotion.
>
> Now, if we get too many issues involved, then we got two problems to settle. And unless the man has some real good information with regard to discrimination, it is difficult—it makes it more difficult to settle.
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> If you have the two things in there together, then the company gets their back up a little more and it is hard to settle the whole thing.
>
> We found it is better if we say: "You have refused a man a promotional opportunity that is

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[9] *See e.g.*, I JA 52, 142-44, 144-48, 188, 254-55, 301; II JA 392, 455-61.

> due him. Treat every man as a man, not as he goes to this church, that church, black or white, but treat every man as a man."
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> * * *
>
> The main thing we are after is the economics in the situation, the more money for the man, the promotional opportunity or to have something removed from his record.

(I JA 187 ,188-89).[10]

The district court credited this testimony and found that the unions did perceive that the company was less willing to resolve grievances that expressly alleged racial discrimination. (Pet. App. 138a.) The district court did not find that the unions were in any way motivated by race in making these tactical judgments about the best way to frame grievances. (*Id.*) The district court also found that the unions' prosecution of grievances had "adequately protected blacks" and had "satisfactorily and properly resolved" individual claims of discrimination in such company practices as discharges of non-probationary employees, work assignments, shift differentials and overtime. (*Id.* 93a, 101a.) Nonetheless, the court found that the unions' preference for basing grievances on contract provisions other than the non-discrimination clause was "unacceptable," because "vigorous pursuit of claims of racial discrimination would have focused attention upon racial issues and compelled some change in racial attitudes." (*Id.* 138a.)[11]

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[10] See also I JA 157-58, 239-40, 247, 301-02.

[11] The district court gave one other reason for finding the unions' practice "unacceptable": complaints that an employee had suffered racial harassment from a supervisor or fellow employee often did not involve any contract provision other than the non-discrimination clause. (Pet. App. 138a.) As a result, the district court concluded, racial harassment "grievances involving no loss of pay or permanent disciplinary record were virtually ignored." (*Id.*) The district court did not find that the unions' treatment of harassment complaints was based in any way on an impermissible racial motivation. (*Id.*) Nonetheless, on the basis of this finding alone, the district

2. *The Unions' Opposition to Lukens' Testing Practices.* Lukens, like many other employers in the steel industry, used written tests as a selection device for certain positions in the bargaining unit.[12] The district court found that the unions consistently opposed these tests. (Pet. App. 137a; *see also id.* 90a.) Indeed, undisputed evidence, in the form of testimony by union negotiators and contemporaneous union documents, established that the unions vigorously opposed the use of such tests at Lukens and throughout the industry because they were a barrier to employees' exercise of seniority rights to claim opportunities for better jobs, and, in the unions' view, they tested skills and knowledge that in many instances had no relation to the jobs in question. This same undisputed evidence also established that the unions had a particular concern that written tests tended espe-

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court found the unions liable for "[t]oleration and tacit encouragement of racial harassment." (*Id.* 147a.)

This liability finding is not before the Court, because the court of appeals vacated the district court's underlying finding that racial harassment at Lukens was a class-wide problem. After revising the limitations period for claims asserted under § 1981, the court of appeals was unable to determine whether incidents of racial harassment had occurred frequently enough after 1971 to support a class-wide finding of liability, or whether it was "something which occurred only in a few isolated incidents." (*Id.* 14a-15a.) The district court had found approximately 35 such incidents in the 13-year limitations period or shortly before (*id.*), and the number of incidents of which the unions were aware was considerably smaller—about 13. Moreover, the record showed that in 10 of those 13 cases, the unions took some action, which included filing grievances, to prevent a recurrence of the harassment or to obtain other relief for the victim. (*See, e.g.*, I JA 142-44; II JA 451-52, 534-35; Plaintiffs' Exhibits 696-697 (admitted at Tr. 6.42); Plaintiffs' Exhibit 853 (admitted at Tr. 14.252-.254); Union Exhibit 265 (admitted at Tr. 28.113-.115).)

[12] The tests primarily used by Lukens during the limitations period were the Wonderlic Test, which was discontinued in 1971, and the Lukens Shop Math Test, which Lukens developed and began using as a criterion for entry into most craft jobs after 1973. (Pet. App. 87a-90a.)

cially to disadvantage black employees, and that the unions communicated this concern to management. (I JA 71-72, 184-86, 197, 270-71, 274-75; II JA 537, 548-50, 552, 558-59, 560, 563, 566-68, 573, 689-90).[13]

Because testing of this kind was an industry-wide problem, the International Union addressed it on the industry level. The first step was collective bargaining with the major steel companies, to negotiate for and obtain a contract provision restricting the use of tests. (I JA 231, 271.) Lukens, as a smaller company, was not directly involved in these negotiations, but agreed to an identical contract provision, as it generally did with major contract improvements that came out of industry-level bargaining. (Pet. App. 132a; I JA 185-86, 193.) This contract provision imposed three independent restrictions on tests used in connection with competition for jobs under seniority agreements. Any such test "must in any event be a job-related test"; all tests must also be "fair in their makeup and in their administration" and "free of cultural, racial or ethnic bias." (II JA 360-63, 538-41.)

The unions' second step was to devise an industry-level program for enforcing these testing restrictions, using the resources of the International Union's Arbitration Department. The author of this enforcement program was the director of that department, who is black, and the primary reasons for his industry-level approach to this problem were the unusual degree of complexity of the issues, the level of technical knowledge needed to arbitrate testing cases, and the unusual expense of such arbitrations. (I JA 232-35). In this enforcement program, the Director of Arbitration focused his efforts on the contract requirement that all tests "must in any event be . . . job-related." Because that requirement under the contract is absolute, and unlike Title VII

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[13] The International Union's negotiating documents that appear in the Joint Appendix are all identified and described in II JA 716-18.

does not depend upon an additional showing of discriminatory racial impact, the union can win a grievance by showing that the test in question is not job related, without also having to prove that the test has a disparate impact or other form of "racial bias." By proving that a test is not job related, the union can eliminate use of that test as to all employees, without undertaking the added complexity and expense of also proving a disparate impact. A victory on grounds of racial bias alone might not have the same broad effect. (I JA 237.) Moreover, at the time of trial, the Arbitration Department had a 100 percent success rate on the issue of job-relatedness; it had won every case it had arbitrated on that issue. (I JA 236.)[14]

The district court found that "[a]lthough the unions did object to Lukens' use of tests of all kinds, the unions never based their opposition on the assertion that the tests had racially disparate impact . . . ." (Pet. App. 137a.) Instead, the district court found, "the unions argued only their traditional position" that tests undercut seniority rights. (*Id.*)

3. *Grievances Over the Discharge of Probationary Employees.* The Lukens collective bargaining agreement,

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[14] At the time of trial the Arbitration Department was preparing to arbitrate a grievance challenging the use of Lukens' Shop Math Test, on grounds that it was not job-related within the meaning of the contract. (I JA 230, 279; II JA 630.) At Lukens, the unions had also filed a grievance in 1970 over the company's plan to use the Wonderlic test, among others, for the selection of employees to man the new Strand Casting unit. (II JA 641, 646, 652). Shortly after the unions appealed that grievance to arbitration, the company decided to drop the Wonderlic from the battery of tests it was using for that purpose. (II JA 644, 653-54, 693, 695-96, 698, 702.)

There is no record evidence that the unions at Lukens failed to pursue any employee's complaint about the Wonderlic test or the Shop Math Test after the contractual testing restrictions took effect. In addition, undisputed evidence shows a number of grievances and complaints that the unions pressed over Lukens' use of other tests. (*E.g.*, I JA 153-54, 211-12, 240; II JA 604, 615, 622, 703.)

like those throughout the steel industry, provides that every new employee must serve a probationary period during which he may be discharged in the company's exclusive discretion. (I JA 268; II JA 370.) After that probationary period has been successfully completed, the employee comes under the protection of the contract's requirement that there be "just cause" for discharge, and acquires the right to have the company prove its "just cause" in the grievance/arbitration procedure. (I JA 268; II JA 368.)

Before 1974 the collective bargaining agreement included only one restriction applicable to the discharge of probationary employees: it provided that the company's discretion to discharge "will not be used for purpose of discrimination *because of membership in the Union.*" (I JA 268; II JA 370, emphasis added.)[15] In the 1974 industry-level negotiations, the International Union negotiated a "change" or "improvement" that for that first time also prohibited management from using this discretionary power to discharge probationary employees "for purpose of discrimination because of race, color, religious creed, national origin or sex . . . ." (I JA 268-69, 273.) The same clause was added to the Lukens contract, effective August 1, 1974. (II JA 378-79; Tr. 14.61-.63.) After that date there were relatively few probationary discharges at Lukens, and it would have been difficult to discern a pattern of discrimination in such discharges from statistical evidence.[16]

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[15] The general non-discrimination clause, quoted *supra*, at page 8, provided only that *"the provisions of this Agreement* shall be applied to all employees without regard to race . . ." (emphasis added). That language by its terms did not apply to management's exercise of its retained discretion to discharge probationary employees.

[16] Because the issue was not focused on at trial there is no single exhibit that summarizes the number of probationary discharges during this period. The record, however, contains copies of Lukens' documentation of all probationary discharges in the period covered by the statistical evidence at trial. Those documents show that between August 1, 1974, and December 31, 1974—the first five

The record contains very little evidence about the unions' enforcement of the special non-discrimination clause applicable to probationary employees. No witness testified that he had ever complained to the union about a probationary discharge. The president of Local Union 1165, though apparently unaware of the new provision (I JA 168; Tr. 14.61-.63), testified that within the year preceding trial the International Union had instructed local officers to try to make a record of probationary discharges to see whether there was a provable pattern of racial discrimination. The local union was in the process of doing so but did not yet have enough evidence to make such a record. (I JA 166-67.) The only other evidence on this point was the testimony of the chairman of the grievance committee, a black employee who had held the office for less than a year. He testified, "we don't file grievances for probationary employees," because the unions have "no jurisdiction" over "new hires." (I JA 224, 226-27.)

Based on the testimony of the grievance chairman, the district court found that the unions had a "uniform policy of not filing grievances on behalf of probationary employees, for any reason." (Pet. App. 137a.) The court also found that the collective bargaining agreement had prohibited racial discrimination against all employees, probationary or permanent, since 1965 (*id.*), and that the unions knew that Lukens was discharging black probationary employees "at a disproportionately higher rate than whites." (*Id.*)[17]

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months after the new contract clause became effective—Lukens discharged 28 black employees and 22 white employees while on probation. From January 1, 1975, to February 1977, the end of the period covered by the evidence on discharges, only 4 black employees and 8 white employees were discharged while on probation. *See* Lukens' Exhibits 2032-2158 (discharges of white probationary employees); Lukens' Exhibits 2213-2372 (discharges of black probationary employees); Tr. 22.3-22.6 (where exhibits are explained and admitted into evidence).

[17] The unions challenged these latter two findings on appeal on grounds that they were, respectively, an erroneous construction of

4. *Grievances Over Company Discrimination in Initial Assignments.* At Lukens, as in many parts of the steel industry, management for many years took race into account in assigning new employees to vacant jobs within the plant. (Pet. App. 68a; I JA 262-63.) These initial assignments are an integral part of the hiring process. (I JA 263-64, 267.) Beginning in the late 1950s, the International Union tried repeatedly in industry-level bargaining to obtain a contractual non-discrimination clause that would prohibit racial discrimination "in all matters pertaining to hiring." (I JA 267; II JA 576, 577.)[18] The industry consistently refused to agree to such a clause, maintaining a staunch position that hiring and initial assignments were none of the unions' business. (I JA 267-68.)

Finding it impossible to obtain a direct prohibition of discrimination in initial assignments, the unions bargained for and obtained contract provisions that gave every employee the right to transfer from his initially assigned job to a seniority unit of his own choosing, based on seniority (I JA 263-65.) These transfer rights gave each employee the means by which to "overcome [the initial] assignment" at an early point in his career by transferring to another part of the plant. (I JA 263.) The undisputed testimony of the International Union's chief negotiator on seniority issues, as well as contemporaneous union documents, established that one of the

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the contract and clearly erroneous. The court of appeals apparently rejected both arguments. (Pet. App. 24a & n.9.)

[18] Compare this proposed language with that of the nondiscrimination clause that Lukens and the rest of the industry accepted, quoted at page 8, *supra*. (I JA 268; II JA 359, 691-92.) The clause that the industry accepted is limited to the application of the provisions of the collective bargaining agreement. Because the industry has never agreed to any contractual provisions governing hiring (other than the statement in the management rights clause that hiring is exclusively the prerogative of management, *see, e.g.*, II JA 368), the existing nondiscrimination clause does not have any application to the hiring and initial assignment of new employees. (I JA 267-68.)

unions' primary reasons for negotiating these transfer rights was to address the problem of management's racial discrimination in initial assignments and to open all jobs to all employees regardless of race. (I JA 263, 269; II JA 545-47, 587, 719; see also I JA 194-95.) As a result of these bargaining efforts, employees at Lukens have had the right since 1962 to use their full company seniority to transfer to job vacancies anywhere in the plant. (Pet. App. 63a-64a.)[19]

The district court acknowledged that the collective bargaining agreements "do not give the unions any voice in initial assignments." (Pet. App. 139a.) Nonetheless, the court concluded that the unions could have challenged discriminatory assignments on the theory that "once employees are hired, they are entitled to the protections of the collective bargaining agreement" and that "[t]o require blacks to continue to work in lower paying and less desirable jobs, in units disparately black, is to discriminate against them in violation of the collective bargaining agreement (and, of course, also in violation of Title VII.)" (*Id.*) The district court found that the unions had never tried to use "this rather obvious mechanism for protecting the interests of their members." (*Id.*)[20]

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[19] After obtaining the basic transfer right in 1962, the unions subsequently negotiated at Lukens for improvements in the system to eliminate the potential for discrimination or favoritism in competition for transfers. The most significant improvement, achieved in 1971, required that notice of all vacancies available for transfer be posted throughout the plant for bidding by interested employees. (Pet. App. 65a, 80a.) The unions' purpose in negotiating for this change was to prevent certain employees from having an edge over others because they had relatives or friends in the most desirable units who could give them advance word of upcoming vacancies. (Pet. App. 80a; I JA 186, 195-97.)

[20] This "rather obvious" contract theory of discrimination had not been advanced by plaintiffs' counsel at trial or in post-trial briefing, and it was contrary to the interpretation that both the union and the steel industry attached to their contract, as described in the undisputed testimony of the International Union's chief negotiator on this subject. (I JA 267-68.) Given that both parties to the contract understood that the contract did *not* embrace this

C. The District Court's Theory of Union Liability

As we have already described, the district court rejected every claim that the unions had committed acts of discrimination against black employees, and made no finding that the unions had acted in any respect out of a racial motivation. (*See* page 5, *supra*.) The district court summarized all of the facts that it found to support union liability as "repeated failures . . . to include racial discrimination as a basis for grievances or other complaints against the company." (*Id.* 137a.)

The legal theory on which the district court held that the unions were liable, based upon these findings, was succinctly stated as follows:

> [M]ere union passivity in the face of employer discrimination renders the unions liable under Title VII and, if racial animus is properly inferrable, under § 1981 as well.

(*Id.* at 139a.) Although the district court thus recognized that an intent to discriminate is a necessary premise for liability under § 1981, it equated intentional "passivity" with intentional discrimination. The court said:

> [T]he evidence in this case proves far more than mere passivity on the part of the unions. The distinction to be observed is between a union which, through lethargy or inefficiency simply fails to perceive problems or is inattentive to their possible solution (in which case, at least arguably, the union's

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theory, it is difficult to comprehend what the district court expected the unions to tell an arbitrator. The unions challenged the court's finding on these grounds on appeal, but the court of appeals did not address this argument, presumably because it vacated the underlying finding of company discrimination in initial assignments for want of a proper plaintiff to assert this claim. (Pet. App. 15a-20a.) Although as a result of the order vacating this liability finding, this question is not technically before this Court, the court of appeals invited plaintiffs' counsel on remand to move for intervention of new plaintiffs to revive both this claim and the district court's finding of liability. (*Id.* 20a-30a.)

> inaction has no connection with race) and a union which, aware of racial discrimination against some of its members, fails to protect their interests.

(*Id.* 139a-140a.) The court went on to hold that if a union "intentionally avoids asserting discrimination claims," it is liable under both Title VII and § 1981 "regardless of whether, as a subjective matter, its leaders were favorably disposed toward minorities." (*Id.*)

Based upon this conclusion of liability, the district court entered a permanent injunction against the unions. (*Id.* 155a-159a.) The court also ordered that proceedings begin on "stage two" of the class action, to identify individual victims of the practices it had found unlawful and to determine the relief to which each would be entitled, including individual injunctive relief and back-pay. (*Id.* 149a-150a; I JA 3.) The unions filed an interlocutory appeal from the district court's injunction and the findings of liability that supported it. (I JA 3.)

D. The Court of Appeals' Decision

The court of appeals affirmed on the same "passivity" theory, describing its holding with respect to the unions as follows: "[T]he unions violated Title VII and § 1981 by failing to assert racial bias as grievances . . . ." (Pet. App. 3a.) Although the court of appeals acknowledged that the district court's theory of liability was controversial, it accepted the "premise that there is an affirmative duty on the part of the unions to combat discrimination in the workplace." (*Id.* 25a.) The court also concluded that this duty included the particular obligation to assert claims of race discrimination in grievances. (*Id.* 26a.) It said:

> The case against the unions here is stronger than one of mere acquiescence. The district court found that the unions intentionally avoided asserting claims of discrimination. In so doing, the unions violated the duty of fair representation owed to their members . . . . By shirking their responsibility for pre-

> senting grievances based on discrimination, the unions also violated the duty to enforce the collective bargaining agreement.

(*Id.*, citations omitted.) Then, like the district court, the court of appeals equated an *intentional decision* not to challenge employer discrimination with *intentional discrimination.* The court stated:

> The deliberate choice not to process grievances [alleging discrimination] also violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation. The district court's finding of intentional discrimination properly supports the claims under § 1981 as well.

(*Id.* 26a-27a.) Accordingly, the court of appeals affirmed the district court's findings of union liability and the injunction against the unions. (*Id.* 27a.)[21]

ARGUMENT

Introduction and Summary

Under both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, an employee who is the victim of employment discrimination by his employer may sue for relief directly against the employer. The employee may do so whether or not a union is the exclusive bargaining representative for employees in that workplace. Similarly, if it is the union that discriminates against him, he may sue the union directly for relief from that discrimination. This case involves neither of those situations. The question here is whether Title VII or § 1981

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[21] A recent opinion of the Third Circuit restated that court's understanding of the theory underlying its decision in the instant case. In *Commonwealth of Pennsylvania v. Operating Engineers Local 542*, Nos. 85-1540 and 85-1706 (3rd Cir., Dec. 5, 1986), the court cited the decision in the instant case for the proposition that if the union obtained information of employer discrimination "it will owe an affirmative duty to its minority members to take action against the offending employer or employers to enforce the nondiscrimination provisions of its collective bargaining agreements." *Id.*, slip op. at 23.

places upon the *union* an affirmative duty to enforce the prohibitions against *employer* discrimination that are contained in those statutes—put another way, whether those statutes require a union to make affirmative efforts to prevent or remedy acts of employer discrimination.

The unions in this case have not been found to have engaged in any discrimination against respondents. The only party found to have discriminated in this case is the employer. Thus, for example, it was the employer, not the unions, that was found to have subjected blacks to discriminatory tests for certain promotions and transfers and to have discharged black probationary employees on a discriminatory basis. The courts below held the unions liable in this case not for discrimination committed by the unions but for discrimination committed by the employer.

The courts below reached this result by concluding that Title VII and § 1981 place upon unions an affirmative duty to seek to prevent or remedy employer discrimination. In the words of the district court, "mere union passivity in the face of employer-discrimination renders the unions liable under Title VII" (Pet. App. 139a); and, in the words of the court of appeals, under Title VII "there is an affirmative duty on the part of unions to combat [employer] discrimination . . . ." (Pet. App. 25a.) With respect to § 1981, the lower courts equated an intentional failure by a union to fulfill this "affirmative duty" with intentional discrimination, and thus ruled that § 1981 is violated when a union intentionally decides not to challenge employer discrimination, regardless of whether "its leaders were favorably disposed toward minorities." (Pet. App. 25a, 140a.)

Applying these theories of liability to the facts of this case, the courts below found the unions liable not for a generalized failure to challenge or address discrimination by the employer, but for the failure to do so in a manner deemed by the lower courts to be "acceptable." (Pet. App.

138a.) Thus, the record is replete with undisputed evidence of union attempts to prevent or remedy the very acts of employer discrimination found by the district court: discriminatory tests, discrimination in initial assignments, discrimination in discharges, and racial harassment. See pages 10-17, *supra*. In fact, the district court found a number of instances in which action by the unions had effectively prevented or remedied employer discrimination. See page 10, *supra*; see also Pet. App. 80a-81a. The unions' default, as the courts below saw it, was a "reluctan[ce]" (Pet. App. 138a), where grievances or complaints could be based on some other requirement of the collective bargaining agreement, "to include racial discrimination as a basis for grievances or other complaints against the company" (Pet. App. 137a). While the district court recognized that the unions' approach might achieve full vindication for individual grievants, the court found that this approach would not satisfy the unions' affirmative duty to combat discrimination by the employer:

> [I]t seems obvious that vigorous pursuit of claims of racial discrimination would have focused attention upon racial issues and compelled some change in racial attitudes. [Pet. App. 138a.]

We show in this brief that neither Title VII nor § 1981 places an affirmative duty on unions to combat employer discrimination. And, once that point is established, it follows that neither Title VII nor § 1981 prohibits a union from making an intentional decision, not motivated by racial animus, to refrain from affirmatively attacking an employer's discriminatory conduct: it is not wrong intentionally to refrain from doing that which one has no duty to do.

In part I, *infra*, we show that Title VII does not place an affirmative duty on unions to combat employer discrimination.

A. Section 703(c)(3) of Title VII is the exclusive provision of that Act dealing with the question of union

responsibility for employer discrimination. That section is explicit that the only basis on which a union is to be held responsible for discriminatory conduct by an employer is when the union has "cause[d] or attempt[ed] to cause [the] employer to discriminate." Those words must be understood to create only a negative duty on unions to refrain from bringing about employer discrimination. Consistent with established usage, § 703(c)(3) cannot be construed to place on unions an affirmative duty to combat or challenge employer discrimination.

The plain meaning of the words of § 703(c)(3) is confirmed by this Court's interpretation of the same words in the context of the statutory provision upon which § 703(c)(3) was modeled—§ 8(b)(2) of the National Labor Relations Act ("NLRA"). This Court has understood "cause" as used in the "cause or attempt to cause" standard of § 8(b)(2) to have its normal and established meaning—the union must "bring about" or attempt to "bring about" the employer discrimination.

Only by concluding that Congress did not mean what it said in § 703(c)(3) could a union be found to violate Title VII merely by failing to take action against an employer's discrimination.

B. The approach of the courts below, and of other courts reaching the same conclusion, is based on the assumptions that the failure of a union to combat employer discrimination violates the union's duty of fair representation and that, despite the explicit language of § 703(c)(3), Title VII was meant to incorporate that duty as so understood. This approach reflects a basic misunderstanding of a union's duty of fair representation and the role of unions under the federal labor laws. More than that, interpreting Title VII to compel unions to pursue certain substantive goals would alter the role of unions in a way that would be destructive of the system of collective bargaining established by the national labor laws.

Congress has legislated regarding the workplace in two entirely different ways. Through the NLRA Congress has established a structure and procedure by which private parties, unions and employers, may address and attempt to reach private resolutions of workplace issues according to the parties' particular needs or desires. Establishment of this process does not guarantee any particular substantive results regarding the terms or conditions of employment. Indeed, it is a basic tenet of the system of private collective bargaining established by the NLRA that government may not dictate the substantive positions that unions take in bargaining a contract or in resolving grievances under a contract.

When Congress has determined that employees should have particular substantive rights in the workplace, Congress has fashioned a different kind of legislation: it has legislated rights—including, for example, the rights established by Title VII—that accrue directly to individual workers and that do not depend on the process of collective bargaining.

The duty of fair representation is part of the process of collective bargaining established by the NLRA. The duty requires only that unions exercise their powers as exclusive bargaining representatives in a manner free from improper motivations, and not that unions take certain substantive positions. The duty of fair representation has no application to substantive rights conferred by statute directly upon individual employees.

To place upon unions the obligation to achieve particular substantive objectives through the process of private collective bargaining would alter and burden that process. This Court's cases make clear that Title VII should not be read affirmatively to alter or burden the role of unions in the collective bargaining process without clear and express words calling for such a result. And the words of § 703(c)(3) call for no such infringement upon the collective bargaining system.

In part II, *infra*, we show that § 1981 also does not place upon unions an affirmative duty to combat employer discrimination.

Section 1981 provides that all persons in the United States "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." These words, on their face, provide no basis for holding a union liable for discriminatory conduct of an employer. And, this Court's construction of these words in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), leaves no room for such a theory of liability.

In *General Building Contractors*, this Court rejected the argument that § 1981 places an affirmative duty on employers to combat discrimination in the selection of the employers' workforces by a union-operated hiring hall. The analysis of the Court in that case is controlling here: § 1981 prohibits only intentional discrimination; it does not require any party to seek to ensure that another party does not discriminate.

I. TITLE VII DOES NOT PLACE UPON UNIONS AN AFFIRMATIVE DUTY TO COMBAT EMPLOYER DISCRIMINATION

A. The Words of the Statute Create No Such Affirmative Duty

1. The point of departure for determining the meaning of a statute is the statute's language, which after all is what was duly agreed upon by the necessary majority of members of Congress in both houses and adopted as law. *E.g.*, *United States v. James*, —— U.S. ——, 106 S.Ct. 3116, 3121 (1986). In this case, the pertinent language is found in § 703(c) of Title VII, 42 U.S.C. § 2000e-2(c), which defines the practices of unions that constitute violations of the Act.

Section 703(c) contains three distinct proscriptions applicable to unions. The first two of these proscriptions,

§§ 703(c)(1) and (c)(2), have no application here. These subsections are set forth in terms parallel to the prohibitions applicable to employers in §§ 703(a)(1) and (a)(2) and prohibit unions from engaging directly in certain forms of discriminatory conduct. See page 3, *supra*. These provisions do not address the question of union responsibility for employer discrimination—the issue presented by this case. That issue is addressed expressly and exclusively by § 703(c)(3).[22] Subsection 703(c)(3) provides as follows:

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[22] The court of appeals did attempt to put this case within the framework of § 703(c)(1): "The deliberate choice not to process grievances also violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation." Pet. App. 26. But that attempt is no more than a play on words and does not bear analysis. At the threshold, though the point may have no legal significance, the district court did not find that the union chose "not to process grievances"; rather, the finding, and the evidence, were that the unions were "reluctant" to assert "racial discrimination as such" in grievances when other grounds for relief could be asserted. Pet. App. 137a-138a. More important, the district court did not find, and there was no evidence to support a finding, that this "reluctan[ce]" was racially motivated. To the contrary, the district court credited the union officials' testimony that this "reluctan[ce]" was predicated upon tactical considerations other than race. See page 10, *supra*. Thus, the unions' "reluctan[ce]" to assert "racial discrimination as such" was not discrimination and was not discriminatorily motivated. At the most, this "reluctan[ce]" could be characterized as a failure to challenge discriminatory conduct of the employer. Where, as here, there is no finding that the union was racially motivated, § 703(c)(1) has no application to such conduct.

The court of appeals attempted to, but could not, alter that reality simply by stating that the "deliberate choice not to" challenge the discrimination of another is itself discrimination. The sponsors of Title VII in the Congress repeatedly assured their colleagues that the concept of discrimination contained in the Act was "clear and simple" and had no "hidden meaning." 110 Cong. Rec. 7207 (1967) (interpretative memorandum of Senators Clark and Case, recognized by this Court as authoritative; *see Teamsters v. United States*, 431 U.S. 324, 350-51 & n.35 (1977)); 110 Cong. Rec. 5863-64 (1964) (remarks of Sen. Humphrey: discrimination has a "pre-

> It shall be an unlawful employment practice for a labor organization—
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> * * *
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Thus, the Act is explicit that the only basis on which a union is to be held responsible for discriminatory conduct by an employer is a finding that the union has "cause[d] or attempt[ed] to cause [the] employer to discriminate." The word "cause" is basic in our jurisprudence. It has an established meaning. Black's Law Dictionary (Revised Fourth Edition, 1968), at 278, gives the following definition of the verb "cause": "To be the cause or occasion of; to effect as an agent; to bring about; to bring into existence; to make." Consistent with this definition, § 703(c)(3) must be understood to create only a negative duty on unions to refrain from "bring[ing] about" employer discrimination; § 703(c)(3) cannot, consistent with established usage, be construed to place on unions an affirmative duty to combat or challenge employer discrimination.[23]

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cise, legal meaning"; it means "a distinction in treatment" or "different treatment"); *id.* 7218 (Memorandum by Senator Clark: the meaning of discrimination is clearly established; it is "to make distinctions or differences in the treatment of employees" based upon one of the forbidden criteria); *id.* 7477 (Bipartisan Civil Rights Newsletter No. 9: discrimination "means a distinction in treatment given to different individuals because of their different race, religion, or national origin"). The court of appeals' attempt to stretch the concept of discrimination to cover the failure to challenge discrimination by another party is not faithful to these assurances.

[23] As a leading treatise puts it, "[t]o say that the union 'causes' employer discrimination simply by allowing it is to stretch the meaning of the word beyond its limits." Larson, *Employment Discrimination*, ¶ 44.50, 9-40 (1983).

The relationship between unions and employers is by nature adversarial. *See General Building Contractors Ass'n v. Pennsylvania, supra*, 458 U.S. at 393-394. In this context, if Congress had decided to place upon one private party the duty to police another private party's compliance with the law, that decision would have been novel and remarkable.[24] Congress cannot be found to have intended such a result by the use of words that cannot bear that meaning. If Congress had intended to place on unions a legal obligation to combat employer discrimination, Congress could have found words to say so. Only by concluding that Congress did not mean what it said in § 703(c)(3) could a union be found to violate Title VII merely by failing to take action against an employer's discrimination.[25]

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[24] That decision would have been especially remarkable in light of the fact that labor unions provided key support for inclusion of a fair-employment-practices title in the Civil Rights Act and also provided key support for the Act's passage. *See, e.g.*, 110 Cong. Rec. 7205-06 (remarks of Sen. Clark); *id.* 7482 (Bipartisan Civil Rights Newsletter No. 25). The Steelworkers Union was one of the primary union supporters of the legislation, and at the time was credited with obtaining some critical votes for cloture in the Senate "which might well have been lost but for the Union's efforts." (I JA 315, 318-19; see also II JA 586.) *See also* Schmidt, *Title VII: Coverage and Comments*, 7 B.C. Indus. & Com. L. Rev. 459, 464 (1966) ("without the support of some key elements of organized labor, it is doubtful that Title VII would have been enacted at all").

[25] The only employment discrimination case in this Court that even remotely touches on the meaning of § 703(c)(3) is *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976). In *McDonald*, the primary issue was whether discrimination by an employer against white employees in meting out discipline violates Title VII. There was a secondary issue of union liability in *McDonald* based on allegations in the complaint that the union had "acquiesced and/*or joined in*" the company's alleged racial discrimination by negotiating a lighter penalty for a black employee than for white employees charged with the same misconduct. *Id.* at 284 (emphasis added). The lower courts dismissed the complaint as to all defendants, holding that employees who admit having committed a crime

2. While we believe the bare words of § 703(c)(3) are conclusive of the point, the meaning that flows from those words is confirmed by this Court's interpretation of the same words in the context of the statutory provision upon which § 703(c)(3) was modeled.

In 1935, Congress enacted the National Labor Relations Act ("NLRA") which contained a number of proscribed *employer* practices including, in § 8(3) (now § 8(a)(3)), "discrimination in . . . any term or condition of employment to encourage or discourage membership in a labor organization." 29 U.S.C. § 158(a)(3). In the Labor Management Relations Act of 1947, Congress amended the NLRA to add, *inter alia*, certain proscribed *union* practices. In particular, in § 8(b)(2) of the NLRA, as amended, 29 U.S.C. § 158(b)(2), Congress made it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)." The identity of the

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against their employer cannot invoke the protection of Title VII. *Id.* at 278. This Court reversed and reinstated the complaint. *Id.* at 283. On the issue of union liability, the Court explained its holding as follows:

> The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them. [*Id.* at 285.]

As the quoted sentence demonstrates, the Court understood the complaint in *McDonald* to allege that the union had "take[n] [race] into account" in negotiating a compromise that favored a black employee over the whites. Such an action would constitute intentional discrimination by the union, not failure to oppose employer discrimination. Nonetheless, the court below construed *McDonald* to support the theory that unions are liable simply because they fail to make affirmative efforts to stop an employer from discriminating. Pet. App. 26a.

language of § 8(b)(2) and of § 703(c)(3) makes it apparent that the former was the source for the latter.[26]

This Court has had occasion to state its understanding of the "cause or attempt to cause" language in § 8(b)(2). Thus, in *Machinists v. Gonzales*, 356 U.S. 617, 622 (1958), the Court said that "union conduct . . . *designed to bring about employer discrimination* against an employee" is "the evil the Board is concerned to strike at as an unfair labor practice under § 8(b)(2)." (Emphasis added.) The question before the National Labor Relations Board in an § 8(b)(2) proceeding is "the nexus between union action and employer discrimination." *Id.* at 623. And, the analysis of the Court in *Electrical Workers v. Labor Board*, 341 U.S. 694, 703 (1951), assumed that even a finding of union "encouragement" of employer discrimination would not satisfy the "cause or attempt to cause" standard:

> The intended breadth of the words "induce or encourage" in § 8(b)(4)(A) is emphasized by their contrast with the restricted phrases used in other parts of § 8(b). For example, the unfair labor practice described in § 8(b)(1) is one "to restrain or coerce" employees; in § 8(b)(2) it is to "cause or attempt to cause an employer"; in § 8(b)(5) it is to "require of employees"; and in § 8(b)(6) it is to "cause or attempt to cause an employer." The scope of "induce" and especially of "encourage" goes beyond each of them.

See also Radio Officers v. Labor Board, 347 U.S. 17, 52 (1954) (§ 8(b)(2) violation established where "the employer discriminated upon the instigation of the union").

Thus, this Court has understood "cause" as used in the "cause or attempt to cause" standard of § 8(b)(2) to

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[26] Similarly, this Court has noted that § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), the statute's remedial provision, was modeled after the remedial provision of the NLRA. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975).

have its normal and established meaning—the union must "bring about" or attempt to "bring about" the employer discrimination. The decisions of the courts of appeals and of the Labor Board interpreting the § 8(b)(2) standard have been consistently of the same view. *See, e.g., Glasser v. NLRB*, 395 F.2d 401, 406 (2d Cir. 1968) ("in order for union conduct to violate section 8(b)(2) . . . there must be some direct approach to the employer, or some conduct aimed at him, for the purpose of causing the employer to discriminate"); *NLRB v. Jarka Corp.*, 198 F.2d 618, 621 (3rd Cir. 1952) (the "relationship of cause and effect [is] the essential feature of § 8(b)(2)"; union must have "accomplished" the employer discrimination); *Newspaper & Mail Deliverers' Union of New York & Vicinity (Herald-Tribune)*, 93 N.L.R.B. 419 (1951).

The uniform decisional law on the interpretation of § 8(b)(2) is important not simply because it reflects the judicial and administrative understanding of words identical to those that govern this case. This line of authoritative interpretation was firmly established prior to enactment of Title VII. It is appropriate to assume that when Congress chose to borrow the words of § 8(b)(2) for use in § 703(c)(3) of Title VII, Congress's use of those words was informed by the established judicial and administrative interpretation. *See, e.g., Randall v. Loftsgaarden*, —— U.S. —— ,106 S.Ct. 3143, 3153 (1986); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473 (1959).

3. The legislative history of Title VII does not otherwise throw any direct light on the meaning of the "cause or attempt to cause" standard of § 703(c)(3). But there is legislative history associated with the passage of the Equal Pay Act of 1963 that is pertinent here. The Equal Pay Act, which was enacted when active consideration of Title VII by Congress was already well underway,[27] con-

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[27] The Equal Pay Act was enacted June 10, 1963. Pub. L. 88-38, 77 Stat. 56. Hearings on H.R. 405, which was the source of the basic provisions of Title VII (including § 703(c)(3)), were held

tains the same standard of union liability for employer conduct as that stated in § 703(c)(3): under the Equal Pay Act, "[n]o labor organization . . . shall cause or attempt to cause such an employer to discriminate against an employee in violation of . . . this subsection." 29 U.S.C. § 206(d)(2). The legislative history of this provision reconfirms that the "cause or attempt to cause" standard should be understood according to the natural meaning of the words used.

Enactment of a statute providing for equal pay for equal work posed a particular problem in unionized sectors of the economy. Where employees are represented by unions, wage rates are most often prescribed by a collective bargaining agreement. Wage rates violative of the law might thus be required by a contract between an employer and a union. In such a circumstance, the union would be a direct party to an unlawful contract. But, under the Senate version of the bill, the Equal Pay Act would have placed upon employers the sole responsibility for conforming to the wage requirements of the Act. The House was concerned that under the Senate Bill an employer trying to bring his wage scale into compliance with the Act might meet resistance from a union seeking to maintain compliance with the existing contract, or seeking to negotiate a new contract with a discriminatory pay scale.

This problem was addressed in the House bill by a provision containing the language, quoted above, now codified in 29 U.S.C. § 206(d)(2). 109 Cong. Rec. 9209 (1963). As Rep. Carey explained, this "feature[] of this bill . . . seeks to prevent any labor disputes . . . by prohibiting labor unions from *seeking to induce employers* to violate the act." *Id.* at 9207 (emphasis added). The following colloquy reflects precisely what Congress had in mind:

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in April, May, and June of 1963. *Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 405 and Similar Bills*, 88th Cong., 1st Sess. 5 (1963).

> Mr. O'HARA of Michigan. [After reciting what is now 29 U.S.C. § 206(d)(2).]
>
> It is my understanding, as it is the understanding of the gentleman from New York that if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, they would be subject to all the penalties and all the enforcement provisions provided under the Fair Labor Standards Act.
>
> Mr. GOODELL. I would stress the word "maintaining" in your reply, because we feel that the words "shall cause or attempt to cause" put an obligation on a labor union, as well as the employer, to change that existing agreement, if the agreement is in violation of this act and this requires the employer to violate the act. Does the gentleman agree?
>
> Mr. O'HARA of Michigan. I would agree. Not only does it refer to new agreements but to an existing agreement where a labor organization would attempt to maintain a discriminatory pattern in an old agreement and resist efforts to change to the pattern required by this act. [*Id.* at 9209.]

Thus, the "cause or attempt to cause" language of the Equal Pay Act was designed to prevent unions from seeking to "induce employers to violate the act" by attempting to negotiate or maintain contracts providing for discriminatory wage rates.[28] An analogy in the pure Title VII context would be union efforts to negotiate or maintain contracts calling for racially discriminatory job assignments.[29] There is no suggestion in the Equal Pay Act

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[28] The Department of Labor regulation implementing that provision follows this understanding of the scope of the provision. 29 CFR § 800.106.

[29] A number of the lower courts' Title VII decisions that articulate the theory of union liability for failure to make affirmative efforts to prevent or remedy employer discrimination in fact involve direct union participation in some act or practice of discrimination, as for example, negotiating an unlawful contract provision. *E.g., Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1120-21 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955

materials that the "cause or attempt to cause" language was meant to impose on unions an affirmative duty to combat employer discrimination to which the union is not a party.[30]

B. Any Such Affirmative Duty Would Be Inconsistent with the National Labor Policy

So far as we can discern, the conclusion of the courts below, and of some other federal courts, that Title VII places an affirmative duty on unions to combat employer discrimination stems from the belief that unions already have such a duty under the federal labor laws—in the form of the duty of fair representation—and that Title VII was meant, despite its explicit language, to incorporate that duty. Thus, from the seminal case in this line, Judge Skelly Wright's opinion for the District of Columbia Circuit in *Macklin v. Spector Motor Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 478 F.2d 979, 989 (1973), to the decision below (see Pet. App. 26a), the approach has been that the failure of a union to combat employer

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(1982); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1304 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978), *cert. denied*, 459 U.S. 844 (1983); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1379 (5th Cir. 1974); *Romero v. Union Pacific R.R.*, 615 F.2d 1303, 1310-11 (10th Cir. 1980). In the decision below, the Third Circuit relied on several of these cases as support for imposing liability on the unions in this case even though they had not agreed to any unlawful contract provision or joined in any unlawful acts but had merely failed to oppose the employer's discrimination. (Pet. App. 25a-26a).

[30] Judicial interpretations of the Equal Pay Act consistently support this reading of the "cause or attempt to cause" provision. *See Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180, 181 (4th Cir. 1972), *aff'g, Hodgson v. Sagner, Inc.*, 326 F. Supp. 371, 374-75 (D.Md. 1971) (union violated Act by "insisting on" and "instigati[ng]" an employer violation); *Murphy v. Miller Brewing Co.*, 307 F. Supp. 829, 839 (E.D. Wis. 1969), *aff'd on appeal of other issues*, 457 F.2d 221 (7th Cir. 1972) (union did not violate Act where it did not propose discriminatory wages or otherwise act affirmatively to cause employer to discriminate).

discrimination violates the union's duty of fair representation and thus also violates Title VII.[31]

But, as we now show, this approach reflects a basic misunderstanding of a union's duty of fair representation and, more fundamentally, of the role of unions under the federal labor laws. More than that, by interpreting Title VII to compel unions to pursue certain substantive goals, the cases in the *Macklin* line would alter the role of unions in a way that would be destructive of the system of collective bargaining established by the national labor laws. Title VII should not be so construed in the absence of a clear and express basis in the statute for such a construction.

1. Congress has legislated regarding the workplace in two entirely different ways. Through the NLRA, Congress has established a structure and procedure by which private parties, unions and employers, may address and attempt to reach private resolutions of workplace issues according to the parties' particular needs or desires. Establishment of this process does not guarantee any par-

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[31] The other court of appeals' decisions that have squarely adopted the view that Title VII creates a union duty to make affirmative efforts to combat employer discrimination are: *Howard v. International Molders Union*, 779 F.2d 1546, 1552 (11th Cir.), *cert. denied*, 106 S.Ct. 2902 (1986); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 314 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977). In addition, the cases cited in note 29, *supra*, contain passages that suggest adoption of this theory of liability, although the facts alleged or proved in each of those cases showed direct union involvement in the discrimination.

The Seventh Circuit has rejected the view that unions are liable for a "[m]ere failure . . . to protect . . . employees from discriminatory corporation policies . . . ." *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974). *See also Babrocky v. Jewel Food Co.*, 773 F.2d 857, 868-69 (7th Cir. 1985). The Second Circuit may also have rejected this view. *See Philbrook v. Ansonia Bd. of Ed.*, 757 F.2d 476, 487 (2d Cir. 1985), *remanded on other grounds*, 107 S.Ct. 367 (1986). In addition, a recent Sixth Circuit case may reject the view that a union has a specific obliga-

ticular terms or conditions of employment. In that regard, when Congress has determined that employees should have particular substantive rights in the workplace, Congress has fashioned a different kind of legislation: it has legislated rights—including, for example, the rights established by Title VII—that accrue directly to individual workers and that do not depend on the process of collective bargaining. The duty of fair representation is an integral part of the process of collective bargaining established by the NLRA and has no application outside of that sphere.

a. Employees have many objectives: job security, wages, pensions, health insurance, workplace safety, freedom from invidious discrimination, and countless others. The NLRA establishes a process by which employees may join together to use their collective strength in pursuit of whatever objectives the employee group deems most important. Through their union, employees *collectively* decide which objectives they want to pursue and what measures and what sacrifices they are willing to undertake in support of that pursuit. Such decisions are made with the knowledge that employers and unions are separate and autonomous entities which "proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest." *General Building Contractors Ass'n*, *supra*, 458 U.S. at 394. The objectives the union succeeds in securing in bargaining are directly dependent on the collective economic strength of the employees as compared to the economic strength of the employer. Given that the bargaining power of the employees is finite, achievement of any union objective is at the cost of some other objective. *Cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974).

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tion to make arguments of racial discrimination in grievances. *Haynie v. Ross Gear Division of TRW, Inc.*, 799 F.2d 237, 239, 242-43 (6th Cir. 1986).

This Court has repeatedly stated that insofar as the system of private collective bargaining is concerned, government regulation is limited to the supervision of the process of bargaining, and government may not dictate the substantive positions that unions take in bargaining a contract or in resolving grievances under a contract. "[T]he fundamental premise on which the [National Labor Relations] Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). "The goal of federal labor policy . . . is . . . to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959). That goal is "served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves." *Id.* The parties determine their own bargaining agendas and their own priorities and make their own compromises and agreements. "[G]overnment may not step in and become party to the negotiations," *Golden State Transit Co. v. Los Angeles*, —— U.S. ——, 105 S. Ct. 1395, 1401 (1986), because Congress "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences," *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960).

In determining their substantive positions and priorities, unions are often confronted with competing demands on scarce resources and with issues in regard to which employees in the bargaining unit have legitimate competing interests. This Court has understood that inherent in the process of determining what is best for the collective interest is the need sometimes to balance off the legitimate interests of some members of the bargaining unit against the equally legitimate interests of other members of the

unit. It is often a union's function to "balanc[e] individual and collective interests" so as to develop proposals and strategies that produce "increased benefits for workers in the bargaining unit as a whole." *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 742 (1981). A union must be free to take a position "contrary to that of some individuals whom it represents." *Humphrey v. Moore*, 375 U.S. 335, 349 (1964).

> Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes. [*Id.* at 349-50.]

Consistent with these principles, the duty of fair representation does not place unions under any obligation to take a particular substantive position. Rather, the duty was derived from the NLRA to protect against *abuse* by unions of the exclusive bargaining status conferred by that statute. In *Del Costello v. Teamsters*, 462 U.S. 151, 164-65 n.14 (1963), this court explained the derivation of the duty:

> The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative . . . . The duty stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." [*Quoting from Vaca v. Sipes*, 386 U.S. 171, 182 (1967).]

Thus, the duty requires that unions exercise their powers under the Act free from improper motivations, not that unions take certain substantive positions. In precise terms, the duty requires that positions taken and decisions made by unions must be reached "honestly, in good faith, and without hostility or arbitrary discrimination." *Humphrey v. Moore, supra,* 375 U.S. at 350.

b. In a number of areas Congress has concluded that it is necessary or appropriate for employees to enjoy substantive employment rights regardless of their collective economic strength or their collective bargaining decisions or priorities. In those areas, Congress has enacted statutes directly establishing the rights in question—for example, the FLSA,[32] OSHA,[33] ERISA,[34] and Title VII. These statutes create "federal minimal employment standards" that are "independent of the collective bargaining process" and that "devolve on [employees] as individual workers, not as members of a collective organization." *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724, ——, 105 S.Ct. 2380, 2397 (1985).

Congress has not given unions the responsibility of enforcing these statutory rights against employers. Because these rights "devolve on [employees] as individual workers, not as members of a collective organization," individual employees are entitled to enforce these rights without any need for union involvement. And because the "duty of fair representation . . . is coextensive with [the union's] statutory authority to act as the exclusive representative for all the employees within the unit," *Schneider Moving & Storage Co. v. Robbins,* 466 U.S.

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[32] The Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*

[33] The Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.*

[34] The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*

364, 376 n.22 (1984); see also *DelCostello v. Teamsters*, *supra*, 462 U.S. at 164-65 n.14, that duty does *not* extend to those areas in which the individual employee is not dependent on his union for enforcement of a right but is entirely free to advance and protect his own interests. *Cf. Barrentine v. Arkansas-Best Freight System*, *supra*, 450 U.S. at 742. *See, e.g., Freeman v. Teamsters Local 135*, 746 F.2d 1316, 1321 (7th Cir. 1984).

2. The decisions of the courts below, and of the other courts that share the same view, confuse the two distinct types of federal labor legislation just described. These decisions would make unions responsible for the enforcement of statutory rights that individual employees are entitled to enforce on their own. In so doing, these decisions would interfere substantially with the collective bargaining process as Congress intended that process to function.

To illustrate this point, it is necessary only to consider what it means as a practical matter to oblige unions to combat employer discrimination. As we have discussed, the relationship of unions and employers is that of opposing autonomous entities. In the absence of a collective bargaining agreement, "[m]anagement hires and fires, pays and promotes, supervises and plans. All these are part of its function . . . ." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 583 (1960). A union can affect management's conduct in running the business only to the extent that the union can secure collective bargaining agreements that limit these managerial powers. Thus, a union cannot prevent employer discrimination in violation of Title VII unless the union negotiates for contract provisions that would prohibit management from engaging in practices that violate that law. And, a union that succeeds in obtaining any such contract provisions may thereafter have to expend its resources in the grievance/arbitration procedure in order to achieve any meaningful results.

The interpretation of Title VII advanced by the courts below, therefore, would inject into the process of private collective bargaining governmental compulsion as to the substantive result to be reached, by imposing on each union an affirmative duty to obtain contractual anti-discrimination provisions. Because such "contractual rights and remedies against discrimination"—like any other contractual right that a union secures—"must result from other concessions already made by the union as part of the economic bargain struck with the employer," *Alexander v. Gardner-Denver Co.*, 415 U.S. at 52, the duty the courts below have read into Title VII would effectively fix bargaining priorities for unions. Under the decision below, unions would be compelled to subordinate other bargaining aims to the goal of securing contractual provisions that *duplicate* the protections already conferred by Title VII, and then to spend scarce resources processing grievances that, if successful, will only *replicate* remedies that are available to the affected employees under Title VII. This result would obtain regardless of the other pressing problems that a represented group of employees may face—problems as to which there is no direct statutory protection and as to which the employee group thus is *wholly dependent* upon whatever contractual rights the group can obtain by dint of its collective strength. And the duty created by the court below exists regardless of a union's bargaining strength or *weakness*.

Imposing such a duty on unions would be directly at odds with the basic premise of the system of private collective bargaining established by federal law: that the substance of bargaining is to be left to the parties free from any governmental compulsion. See page 37, *supra*. Governmental imposition such as that required by the standard of union liability adopted below can only destabilize collective-bargaining relationships and interfere with the parties' ability to reach agreements reflecting their needs and desires without resort to economic wel-

fare. Such a requirement thus would defeat the overall aim of the national labor policy: enabling employers and employees "to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Teamsters Union v. Oliver*, 358 U.S. at 295.[35]

The destabilizing effect of injecting required union enforcement of Title VII rights into the collective bargaining process is exacerbated by the inherent vagueness of the contours of the affirmative duty that unions are supposed to undertake. In this case, for example, the record is undisputed, and the district court indeed found, that the unions had challenged the discriminatory practices of the employer. But the courts below found that the unions did not adopt the mode of challenge that the courts believed would have been the most efficacious. Thus, the district court found the unions liable: for challenging the employer's tests on the basis of the contractual job-relatedness requirement rather than on a disparate impact theory (Pet. App. 137a); for failing to assert arguments as to the meaning of the contract that the court, but not the union, believed might be successful before an arbitrator (Pet. App. 137a, 139a);[36]

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[35] Employment discrimination is not the only subject on which individual members seek to dictate unions' priorities through the mechanism of private law suits. For example, in a growing number of cases, employees who have been injured at work have sought to impose liability on their unions for failing to detect or eliminate the hazard that caused the injury. This Court has before it now a case raising the question whether such suits, though otherwise authorized by state law, are preempted by the NLRA. *Electrical Workers v. Hechler*, No. 85-1360 (argued January 20, 1987).

[36] On the issue of probationary discharges, the district court concluded that the general non-discrimination clause, which had been in the contract since 1965, had always protected probationary employees from racially discriminatory discharges. (Pet. App. 137a.) The undisputed testimony of the union's chief negotiator,

and for deciding that the best way to win relief for a black grievant denied a promotion was to base a grievance simply on seniority grounds instead of trying to prove race discrimination (Pet. App. 138a). For liability to turn on such judicial second-guessing is to deny the "union discretion [that] is essential to the proper functioning of the collective-bargaining system," *Electrical Workers v. Foust*, 442 U.S. 42, 51 (1979), as well as the "wide range of reasonableness [that] must be allowed a statutory bargaining representative in serving the unit it represents." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

3. Title VII was not enacted in a vacuum, but against the backdrop of the system of collective bargaining established by the NLRA. There is not the slightest indication that Title VII was meant to alter that system. To the contrary, this Court has stated that the

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however, was that the 1974 addition of a specific contract clause prohibiting such discriminatory discharges was understood as a contract "change" and an "improvement" (I JA 268-69, 273.) The unions thus plainly understood that without this "improvement," the contract contained no provision that protected probationary employees from discriminatory discharges. (*Id.*; see page 14 & note 15, *supra.*)

On the issue of initial assignments, the district court faulted the unions for not having advanced a "rather obvious" contract interpretation that had not even been urged by plaintiffs' counsel—namely, that although the contractual non-discrimination clause would not be violated by a discriminatory initial assignment, it would be violated on the employee's second day at work (and every subsequent day) when the employer required him "to continue to work" in the job to which he had been discriminatorily assigned. (Pet. App. 139a.) This finding ignores the undisputed testimony (again of the union's chief negotiator), that the union and the industry both understood that the language to which the industry had agreed in the non-discrimination clause had no application to initial assignments. (I JA 267-68; see page 16, *supra.*) Given that mutual understanding, it is hardly surprising that the unions failed to file grievances based on some variant of a "continuing violation" theory. (See note 20, *supra.*)

congressional policy of eliminating discrimination "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 69 (1975).[37] *See also TWA v. Hardison*, 432 U.S. 63, 79 (1977). At a minimum, Title VII should not be read affirmatively to burden the role of unions in the collective bargaining process without clear and express words calling for such a result. And as we have seen, the words of § 703(c)(3) call for no such infringement upon the collective bargaining system.

In fact, the category of cases in which a union has merely failed to make affirmative efforts—or sufficiently energetic efforts—to prevent employer discrimination would seem to be the last one in which the national labor policy should be deemed to have been compromised by the enactment of Title VII. Congress enacted Title VII for the very purpose of creating rights that would be independent of "majoritarian processes"; indeed, to make Title VII rights dependent upon the outcome of collective bargaining "would defeat the paramount congressional purpose behind Title VII." *Alexander v. Gardner-Denver Co.*, *supra*, 415 U.S. at 51. Title VII confers on *each* employee, as an individual, an *indefeasible* right to be free from employment discrimination. And Title VII both establishes a procedure by which any employee may

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[37] The court of appeals' decision that this Court reviewed in *Emporium Capwell* was a District of Columbia Circuit decision, rendered shortly after *Macklin*, *supra*. The court of appeals held, in the context of construing employees' rights under § 7 of the NLRA, that unions were required to meet the "high standard" of "remedying [employer] discrimination to the *fullest extent possible, by the most expedient and efficacious means.*" *Western Addition Community Org. v. NLRB*, 158 U.S. App. D.C. 138, 485 F.2d 917, 931 (D.C. Cir. 1973) (emphasis in original). The court of appeals held that if a union fell short of this standard, minority employees were entitled to engage in their own concerted activity in an effort to bargain directly with the employer. *Id.* This court reversed, for the reason described in the text above.

enforce that statutory right and also creates a public agency, the Equal Employment Opportunity Commission, which "is empowered . . . to prevent any person from engaging in any unlawful practice," 42 U.S.C. § 2000e-5(a).

It is thus apparent that Congress did not commission labor unions, which are majoritarian organizations, to serve as Congress' agents in enforcing against employers the individual rights created by Title VII. Nothing in Title VII justifies impairing the national policy of free collective bargaining, which is precisely what the decision below would do.

II. SECTION 1981 DOES NOT PLACE UPON UNIONS AN AFFIRMATIVE DUTY TO COMBAT EMPLOYER DISCRIMINATION

Section 1981 provides that all persons in the United States "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." These words, on their face, provide no basis for holding a union liable for discriminatory conduct of an employer. And, this Court's construction of these words in *General Building Contractors Ass'n v. Pennsylvania*, *supra*, leaves no room for such a theory of liability.

In *General Building Contractors* a group of employers agreed to hire only persons referred by a union-operated hiring hall. The union, acting on its own, was found to have discriminated against blacks in its referrals. No claim was made that the employers were guilty of discrimination, but the lower court held the employers liable for the *union's* discrimination, concluding, in effect, that the employers had "a 'duty to see that discrimination does not take place in the selection of [their] workforce,' regardless of where the discrimination originates." 458 U.S. at 392. This Court reversed.

The Court first held "that § 1981 . . . can be violated only by purposeful discrimination." *Id.* at 391. The Court

then measured against that standard the conclusion of the lower courts in that case that the employers had an "affirmative obligation to ensure the protection of" the plaintiffs from discrimination by the union. *Id.* Thus, that case, like the instant case, involved an asserted affirmative duty of one party to prevent discrimination by another party. There the asserted affirmative duty was sought to be derived from the employers' "nondelegable" responsibility for the selection of their workforces; here the asserted affirmative duty is sought to be derived from the unions' status as exclusive bargaining representative. Though the purported source of the duty is different, this Court's analysis of whether § 1981 imposes such a duty is equally applicable here:

> [In] this litigation the question is not whether the employers and associations are free to delegate their duty to abide by § 1981, for whatever duty the statute imposes, they are bound to adhere to it. The question is *what* duty does § 1981 impose. More precisely, does § 1981 impose a duty to refrain from intentionally denying blacks the right to contract on the same basis as whites or does it impose an affirmative obligation to ensure that blacks enjoy such a right? The language of the statute does not speak in terms of duties. It merely declares specific rights held by "[a]ll persons within the jurisdiction of the United States." We are confident that the Thirty-ninth Congress meant to do no more than prohibit the employers and associations in these cases from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract. It did not intend to make them the guarantors of the workers' rights as against third parties who would infringe them. [*Id.* at 396, emphasis in original.]

The Court went on to add, again in words that apply here as well, the following:

> Our earlier holding that § 1981 reaches only intentional discrimination virtually compels this con-

> clusion. It would be anomalous to hold that § 1981 could be violated only by intentional discrimination and then to find this requirement satisfied by proof that the individual plaintiffs did not enjoy "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens" and that the defendants merely failed to ensure that the plaintiffs enjoyed employment opportunities equivalent to that of whites. [*Id.* at 396-397.]

The decision below cannot be reconciled with these principles. The courts below held that unions are liable under § 1981 for failing to make affirmative efforts to stop the *employer's* discrimination. They held that this liability exists " 'regardless of' [the union] leadership's favorable disposition toward blacks." (Pet. App. 25a). The courts below did not find that the unions' actions were racially motivated or that the unions treated black and white employees differently. Instead, the lower courts held that § 1981's requirement of intentional *discrimination* was satisfied by a finding that the unions made intentional *decisions* not to assert arguments of racial discrimination in grievances. (Pet. App. 26a). But an intentional *decision* not to make affirmative efforts to stop another's discrimination does not, and cannot, substitute for what this Court required in *General Building Contractors*: it does not constitute either "purposeful discrimination" or "racially motivated" action. Where a statute imposes no duty to act, a deliberate decision not to act is not a statutory violation, so long as that decision is not motivated by unlawful considerations.

The conclusion that § 1981 does not impose an affirmative duty on unions to combat employer discrimination is also compelled by the considerations of federal labor law and policy described in part I B of this brief. In *General Building Contractors Assn.*, this Court recognized that unions and employers are autonomous entities in an adversarial setting, each with the "power to oppose" the other, but neither with the "right to control" the other.

458 U.S. at 393-394. The structure and procedure on which the relationship of these parties is founded is established by the NLRA. And, as we already have discussed at length, it is inconsistent with the system of collective bargaining thus established for government to impose upon unions a duty to pursue any particular substantive result. From the set of legitimate union objectives, the priorities of unions are to be set solely by the members, pursuant to their own system of governance, and not by government compulsion. Section 1981, enacted in the aftermath of the Civil War, should not now be read to override these basic precepts of national labor law.

CONCLUSION

For the foregoing reasons, the decision and judgment of the court of appeals should be reversed.

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No. 85-2010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; LOCAL UNION 1165, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; and LOCAL UNION 2295, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, DOCK MEEKS, DAVID DANTZLER, JR., and JOHN R. HICKS, III, Individually and on behalf of all others similarly situated, and UNITED POLITICAL ACTION COMMITTEE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether a union violates Title VII and 42 U.S.C. § 1981 by deliberately treating the non-discrimination provisions of its collective bargaining agreement differently from other provisions, so that it intentionally avoids filing grievances for racial discrimination even though many of its members complain of widespread employer racial discrimination and the union's conduct serves to perpetuate a racially discriminatory environment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2010

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; LOCAL UNION 1165, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; and LOCAL UNION 2295, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, DOCK MEEKS, DAVID DANTZLER, JR., and JOHN R. HICKS, III, Individually and on behalf of all others similarly situated, and UNITED POLITICAL ACTION COMMITTEE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENTS

COUNTER-STATEMENT OF THE CASE

A. The Holdings of the Courts Below

After a 32-day trial, the United States District Court for the Eastern District of Pennsylvania held Lukens Steel Company liable under Title VII and 42 U.S.C. § 1981 for intentional discrimination against its black employees as a class in a wide range of employment practices: initial assignment at

hire, discharge during the probationary period, promotion to craft positions, promotion to salaried positions, toleration of racial harassment, and denial of incentive pay to employees in the predominately black "Pits" seniority unit. (Pet. App. 146a-147a.)[1]

The District Court also found that Petitioners, the United Steelworkers of America and its Local Unions 1165 and 2295 (the "Unions"),[2] the bargaining agents for all hourly employees at Lukens, had intentionally discriminated against their black members at Lukens by deliberately avoiding enforcement of the non-discrimination provisions in the collective bargaining agreement between Lukens and the Unions.[3] The District Court found that the Unions had intentionally (1) failed to challenge the discriminatory discharges of probationary employees, (2) failed and refused to assert racial discrimination as a ground for grievances, and (3) tolerated and tacitly encouraged racial harassment. (Pet. App. 147a.) The District Court stated:

> The clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment. In short, the unions' unwillingness to assert racial discrimination claims as such

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1. Citations to "Pet. App." refer to the appendix filed with the petition in No. 85-2010. A single consolidated joint appendix was filed for both this case and No. 85-1626. It consists of two volumes and is cited herein as "JA". The brief filed by the petitioner Unions is cited as "Unions' Brief", and the brief filed by the United States as *amicus curiae* is cited as "U.S. Brief". The notes of testimony are cited as "N.T." followed by the trial day and the page of the transcript made that day.

2. Local 1165 represented almost all the hourly employees at Lukens. At the time of trial it had approximately 2600 members, while Local 2295 had approximately 80 members. (Pet. App. 133a.)

3. The Unions assert that "[t]he district court found no discrimination committed by the unions." (Unions' Brief 5.) *See also* Unions' Brief 18 ("the district court rejected every claim that the unions had committed acts of discrimination against black employees"); Unions' Brief 21 ("[t]he unions in this case have not been found to have engaged in any discrimination against respondents"). These statements are simply not accurate. The District Court explicitly found: "The defendant unions have discriminated against the plaintiff class on racial grounds, in violation of Title VII and §1981." (Pet. App. 147a.)

> rendered the non-discrimination clause in the collective bargaining agreement a dead letter.

(Pet. App. 138a.)

Although the District Court agreed with other courts which have held that "mere union passivity in the face of employer-discrimination renders the unions liable under Title VII and, if racial animus is properly inferrable, under §1981 as well," (Pet. App. 139a (citations omitted)), the court did *not* base its decision on that ground. Rather, it found as follows:

> *[T]he evidence in this case proves far more than mere passivity on the part of the unions*. The distinction to be observed is between a union which, through lethargy or inefficiency simply fails to perceive problems or is inattentive to their possible solution (in which case, at least arguably, the union's inaction has no connection with race) and a union which, aware of racial discrimination against some of its members, fails to protect their interests. *A union which intentionally avoids asserting discrimination claims*, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under both Title VII and §1981, regardless of whether, as a subjective matter, its leaders were favorably disposed toward minorities.

(Pet. App. 139a-140a (emphasis added).)

The United States Court of Appeals for the Third Circuit affirmed the District Court's findings against Lukens with respect to discrimination in discharge of employees on probation and in promotions to craft positions. The Court of Appeals vacated the District Court's findings of discrimination by Lukens in promotion to salaried positions and toleration of racial harassment, and it remanded the case to the District Court for reconsideration of those findings in light of the Court of Appeals' ruling that the proper limitations period for Section 1981 claims was two years, rather than the six-year period applied by the District Court.[4] The Court of Appeals

4. The Court of Appeals' holding on the applicable statute of limitations is the subject of the Writ of Certiorari granted by this Court in *Goodman v. Lukens Steel Company*, No. 85-1626.

also held that none of the named plaintiffs had standing to assert the claims of discrimination in initial assignment, and it remanded those claims to the District Court to consider the possibility of intervention by other class members to represent the class on those claims.[5] Finally, the Court of Appeals reversed the District Court's finding that Lukens' denial of incentive pay to employees in the "Pits" seniority unit was racially discriminatory. (Pet. App. 34a.)

The Court of Appeals affirmed all of the District Court's findings of discrimination by the Unions. (Pet. App. 27a.)[6] In affirming these findings of intentional discrimination by the Unions, the Court of Appeals stated:

> The case against the unions here is stronger than one of mere acquiescence. The district court found that *the unions intentionally avoided asserting claims of discrimination . . . . The deliberate choice not to process grievances*

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5. The Court of Appeals' remand on this issue and certain other aspects of its decision are subjects of a Petition for Certiorari by Lukens captioned *Lukens Steel Company v. Goodman*, No. 85-1645. As noted by the Unions in their brief (Unions' Brief 2 n.1), the Court has deferred consideration of this Petition pending final approval of a settlement agreement between the plaintiffs and Lukens. The District Court has approved that settlement, but two of the named plaintiffs have filed a Notice of Appeal from that approval.

6. The Court of Appeals did not, as the Unions claim (Unions' Brief 10-11 n. 11), vacate the District Court's holding that the Unions had discriminated against the plaintiff class by tolerating and tacitly encouraging racial harassment. Nor does such a result follow from the action of the Court of Appeals in vacating the District Court's holding that Lukens had discriminated against the plaintiff class by tolerating racial harassment. (Pet. App. 34a.) Unlike the Unions, Lukens did not admit that it treated complaints of racial harassment differently from other complaints. Therefore, the plaintiffs had to prove their case against Lukens on this issue by the accumulation of sufficient anecdotal testimony to demonstrate a pattern or practice. The shortening of the limitations period so that some of those incidents became non-actionable arguably had an effect on the District Court's finding of a pattern or practice by Lukens within the limitations period. On the other hand, Union officials *admitted* that they had a practice of treating grievances alleging racial discrimination differently from other grievances (Pet. App. 138a), so it was not necessary for plaintiffs to prove an accumulation of incidents in order to demonstrate a pattern and practice of discrimination by the Unions.

> *[based on discrimination] . . . violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation.* The district court's finding of intentional discrimination properly supports the claims under § 1981 as well. We therefore find no error in the district court's assessment of liability against the unions.

(Pet. App. 26a-27a (emphasis added).)

B. Statement of the Facts[7]

1. Black Employees' Experience at Lukens Steel Company

The District Court found (and the Unions do not deny) that plaintiffs had adduced a "massive amount of incontrovertible evidence of historical discrimination on account of race at Lukens." (Pet. App. 122a; *see* Pet. App. 68a.) This intentional discrimination affected both the black employees' pay checks and their working conditions. Upon hire, they were assigned to lower paying jobs than whites; during their probationary period,[8] they were much more likely to be discharged than whites; and they had much less opportunity than white employees to achieve promotion to better-paying craft jobs or salaried positions—in part because of Lukens' widespread use of racially discriminatory tests. (Pet. App. 73a-81a, 85a-90a, 94a-103a, 146a-147a.)

Racial harassment was also endemic at Lukens. "[A] large number of foremen treated their white employees more

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7. Throughout this brief, the plaintiffs rely primarily on the facts as found by the District Court because neither the Unions nor the Government challenge any of these findings as "clearly erroneous". The District Court's factual findings, including holdings on "ultimate questions of fact", *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), can be set aside only if they are "clearly erroneous". *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985).

8. The collective bargaining agreement at Lukens provides that new employees must serve a probationary period during which they are subject to discharge at the company's discretion. (II JA 370.) However, since 1965 the agreement also prohibited race discrimination, and in 1974 the provision relating to the probationary period was amended to prohibit discrimination on the grounds of race, color, religious creed, national origin or sex in the exercise of the company's discretion. (II JA 378-79.)

leniently [with respect to discipline] than they treated their black employees." (Pet. App. 94a.) The "mass of evidence of individual instances of racial harassment and/or discriminatory treatment" presented by the plaintiffs (Pet. App. 111a) showed that the racial atmosphere of Lukens was egregious. That evidence includes the following prominent events which took place in the 1970's:

- A cross was burned in an area where black employees normally changed clothes. (Pet. App. 118a.) (This event was dated in the mid-1970's by the testimony of Norris J. Domangue, Lukens' Director of Personnel Administration (N.T. 11.183).)
- The words "Uncle Remus" were painted on the hard hat of Lukens' only black general foreman, and "KKK" was scrawled on his work papers. (Pet. App. 115a-116a.)
- Over a period of years, a white salaried clerk made repeated racially derogatory comments to and about black employees and had a habit of addressing them as "curly", despite black employees' repeated complaints to his superiors. (Pet. App. 116a-117a.)
- In 1978, at least three Lukens employees wore Ku Klux Klan armbands to work there. (Pet. App. 118a.)
- A union official, who was assigned to drive plaintiffs' attorneys' legal assistant to the train station after she had examined documents in preparation for trial, asked her, "How can you stand all those blacks in Philadelphia?" (I JA 49-50.)
- "Racially derogatory graffiti have regularly and constantly appeared on the bathroom walls at Lukens . . . ." (Pet. App. 118a.)
- The words "Go home nigger. You don't belong here" were written on the wall of a "pulpit" which named plaintiff Charles Goodman was assigned to clean. Both the employees who worked in the pulpit regularly at that time were white. (Pet. App. 115a.)

Despite these conditions, Lukens' officials in charge of employee relations and equal opportunity, in their trial testi-

mony, "professed total ignorance of any racial discrimination at Lukens at any time." (Pet. App. 122a.) Lukens management regularly exhibited "a tendency to presume that any charge of racial discrimination was, almost by definition, either totally unfounded or quite trivial." (Pet. App. 120a.) Some management officials were themselves racially biased and others "were apprehensive—unduly so, probably—about the potential effects upon the morale of the white work force, if prompt and significant changes in favor of blacks were implemented." (Pet. App. 119a.)

These attitudes were abetted by the Unions' deliberate avoidance of racial issues, which "served to perpetuate the discriminatory environment." (Pet. App. 138a.)

2. The Unions' Discrimination

The Unions were not ignorant of the conditions which their black members faced at Lukens. "[M]any black employees asserting grievances complained about discriminatory treatment and harassment . . . ." (Pet. App. 138a.) Nevertheless, although their collective bargaining agreement contained several provisions prohibiting racial discrimination (II JA 358-59, 378-79, 541), the Unions deliberately chose to treat violations of these provisions differently from violations of other terms of the collective bargaining agreement. (Pet. App. 138a-140a.) While the Unions filed more than 8,000 grievances between 1967 and 1980 (Pet. App. 135a), they had a policy to "intentionally avoid[ ] asserting [racial] discrimination claims" (Pet. App. 139a), and they "almost never did so until after this suit was filed" (Pet. App. 138a).

Some actions by the Unions outside the limitations period illuminate their motive in adopting this policy.

The United Steelworkers International Union is the certified collective bargaining representative for Lukens' hourly employees; the two local unions are joint agents with the International Union for grievance processing and other local functions. (Pet. App. 132a.) In practice, during the 1960's and 1970's the International Union negotiated "basic steel" agreements with the largest steel companies, and "[a]nything that was agreed to in the International package . . . would be

implemented at the local level." (I JA 193 (testimony of Lloyd Lawrence, President of Local 1165 from 1964 to 1970, I JA 191); *see* Pet. App. 132a.)

In 1962, the "basic steel" bargaining produced agreement on a provision prohibiting racial discrimination. In a unique departure from their uniform practice of including "basic steel" provisions in the Lukens collective bargaining agreement, Lukens and the Unions omitted the non-discrimination provision from the agreement negotiated at Lukens in 1962. The non-discrimination provision was not even discussed then. It was not added to the Lukens agreement until three years later, when *the company proposed it late in the negotiations*. (Pet. App. 133a-134a.)[9]

Lukens historically had racially segregated locker rooms. They were not completely desegregated until 1966. (Pet. App. 68a, 134a.) Lukens and Union officials admitted that segregated facilities were *never discussed* in collective bargaining negotiations and that the Unions did not protest the practice of segregation. (I JA 150, 152, 164-65 [and N.T. 14.38], 201; II JA 727-30.) Complaints by black Lukens employees to Union officials about segregated facilities were met by inaction and by expressions of concern over the possible "repercussions" of racial integration of plant facilities. (I JA 12-13, 83-85, 250-51.) Even when the Pennsylvania Human Relations Commission required Lukens to desegregate the locker rooms, the Unions' District Director informally agreed to an extension of time. (Pet. App. 134a.)[10]

At about the same time a few black men working in the Open Hearth Pits joined together and complained to management about segregated facilities and other problems. Even

9. The company's suggestion was made after the desirability of such a provision had been discussed in the course of a governmental compliance review. (I JA 74-75; II JA 353-54.) There is no indication in the record that a non-discrimination provision would have been added to the Lukens agreement had government pressure not forced Lukens to propose it.

10. It is interesting that management had no hesitation, some years earlier, in writing to the Unions to request a change in the seniority rules to protect some long-service employees, including one whose mill had been shut down and "due to the fact that he was white he was not considered for placement on the Shears and other Mills. . . ." (II JA 333-34.)

though two members of the committee were union shop stewards, they received no help from the Unions, and at trial the person who had served as Local 1165 president from 1964 to 1970 "testified that he was unaware of the existence of any such committee, and had no recollection of any group of black employees having complained about racial matters at the time." (Pet. App. 134a.) By contrast, a management official recalled the committee's complaints and testified that he had discussed them with "union representatives." (I JA 80-81.)

As the District Court noted, the foregoing incidents did "not provide grounds for relief" against the Unions because they occurred outside the limitations period (Pet. App. 134a), but they do shed light on the Unions' attitude (Pet. App. 133a). *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

The crux of the evidence upon which the District Court found the Unions liable was the Unions' deliberate policy within the limitations period of not seeking to enforce the non-discrimination provisions of the collective bargaining agreement in the same manner or to the same degree as they sought to enforce other provisions. As set forth above, a general non-discrimination provision was added to the Lukens collective bargaining agreement in 1965. As a result of "basic steel" bargaining, specific non-discrimination provisions were added with respect to testing in 1968 and with respect to probationary discharges in 1974.[11] Whatever benefit those

11. The general provision, which was added to the "basic steel" agreement in 1962 but did not appear in the Lukens agreement until 1965, states as follows:

> It is the continuing policy of the Company and the Union that the provisions of this Agreement shall be applied to all employees without regard to race, color, religious creed, national origin or sex.

(II JA 358-59.)

Three years later, the "basic steel" negotiations produced agreement on a provision providing that "[t]ests shall be fair in their makeup and in their administration [and] shall be free of cultural, racial or ethnic bias . . . ," which was incorporated in the Lukens collective bargaining agreement. (II JA 360-63, 538-41.)

Finally, in 1974, by the same means, a provision was added to the Lukens agreement providing that the company's discretion to lay off or discharge employees during the probationary period after hire "will not be

provisions may have produced at other steel companies, they were rendered "dead letters" at Lukens because the Unions there deliberately chose to avoid invoking them despite the Unions' knowledge of widespread racial discrimination at Lukens. (Pet. App. 137a-138a.)

Many black employees complained to the Unions about the pervasive racial discrimination and harassment occurring at Lukens. (Pet. App. 138a.) Nevertheless, until 1975—when the class was certified in this action—the Unions had filed no more than three grievances charging racial discrimination.[12]

Although Lukens consistently used racially biased tests

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used for purpose of discrimination because of race, color, religious creed, national origin or sex . . . ." (II JA 378-79.)

12. II JA 424, 448-49, 451-54. None of these grievances explicitly claims *racial* discrimination. Only one (II JA 424) refers to the non-discrimination provision of the collective bargaining agreement, but the context of the others suggests that they *may* have been about racial discrimination. The Unions claim credit for three more pre-1975 grievances asserting discrimination claims. (II JA 434-36, 622, 669; *see* Unions' Brief 8 n.8.) However, neither the language nor the context of those three grievances indicates that they claimed racial discrimination or any other kind of discrimination covered by either Title VII or the non-discrimination provisions of the collective bargaining agreement. Indeed, the Unions acknowledged, in their Proposed Findings of Fact in the District Court (II JA 731 n.44), that the record does not indicate whether *racial* discrimination was claimed in the grievances in Plaintiffs' Exhibit 848 (II JA 433-37) and Unions' Exhibit 276 (II JA 622-25), even though those grievances used the word "discrimination".

The Unions' current claim also ignores the evidence that use of the word "discrimination" did not necessarily mean *racial* discrimination. Benjamin Pilotti, who was a Local 1165 grievance committeeman from 1962 and president from 1975 to at least 1980, testified that the Unions often made claims of discrimination which had nothing to do with racial discrimination. (II JA 169, 171.)

The Unions also claim credit for 17 additional "discrimination" grievances filed in 1975 or thereafter. (Unions' Brief 8 n.8.) By contrast, Lukens' "Grievance Report 1976-1980" shows only nine "discrimination" grievances, including four filed by white employees. (II JA 488.) If the Unions actually filed 17 race discrimination grievances between 1975 and early 1980, one would have to wonder about the reason for the sharp increase after the class was certified in this case. "Such actions in the face of litigation are equivocal in purpose, motive and permanence." *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968).

(Pet. App. 87a-90a), the Unions never filed a grievance charging that any test was racially biased. On the second day of trial of this action, the Union requested from Lukens information on the "shop math" test which Lukens had been using for more than seven years. (Pet. App. 89a; I JA 230; II JA 632-33.) The Unions claim that it was easier and more effective to challenge tests on the ground that they were not job-related. (Unions' Brief 12-13.) However, so far as the record shows, they rarely challenged tests at Lukens on that ground either. Between 1965 (when the general contractual non-discrimination provision came into effect) and 1974 (a year after this action was filed), the Unions filed only one grievance at Lukens challenging a test as not job-related.[13]

In addition, through the time of trial, the Unions had never filed any grievance against Lukens' racially discriminatory discharges of black employees during their probationary period, despite knowledge that blacks were being discharged at a noticeably disproportionate rate. (Pet. App. 137a.)[14]

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13. That grievance challenged the procedure for manning the new strand-casting facility, for which Lukens used a battery of tests. (II JA 641-52.)

14. While the Unions have suggested that they may have been unaware of Lukens' racial discrimination in probationary discharges and/or of the non-discrimination clause added in 1974, the record establishes otherwise. Asked about disproportionate discharges of black employees, the president of Local 1165 testified, "It seems to me that maybe blacks would outnumber the whites, yes, but I don't have the right numbers." (I JA 166.) Although he claimed to have attended a civil rights conference in 1979 where the civil rights director of the International Union discussed probationary discharges of blacks (I JA 166-67), he denied knowing that the non-discrimination clause existed (I JA 168). Nevertheless, he also claimed to have filed a grievance for a black employee who had been discharged during the probationary period, but he could not remember the name or job of the grievant. (I JA 167.) No such grievance was introduced at trial. The president asserted that the grievance chairman processed that grievance (*id.*), but the grievance chairman testified unequivocally, "We don't file grievances for probationary employees." (I JA 226.) Although the chairman testified that he was aware of the contractual provision prohibiting discrimination in probationary discharges (I JA 226-27) and that probationary employees had come to him and asked him to file a grievance under that provision, he stated that he did not do so. (I JA 227.) Not surprisingly, the

By contrast, the Unions filed more than 8,000 grievances within the limitations period (Pet. App. 135a), including 534 grievances over "crossing seniority lines" which were filed in just five years, 1970-74 (II JA 499). Lukens attributed this activity over crossing seniority lines to "the surveillance exercised by certain grievance committeemen," and noted "the Union . . . are [*sic*] dedicated to keeping craft job assignments pure. . . ." (II JA 499-500).[15]

In short, as the District Court found,

> It is undisputed that the unions were reluctant to assert racial discrimination as a basis for a grievance and almost never did so until after this suit was filed, even though many black employees asserting grievances complained about discriminatory treatment and harassment, and even though the union itself believed that racial discrimination was involved in the grievance.

(Pet. App. 138a.)

A particularly striking example is the case of class member Alfred Hicks. Hicks was discharged in July 1978. A white shop steward in Hicks' area of the plant told the union representatives that he thought the discharge was due to racial discrimination. (I JA 290-91, 295.) Yet both the president and Grievance Committee chairman opposed mentioning race discrimination in Hicks' grievance. (I JA 295-96.) Accordingly, the grievance did not assert race discrimination; nor was race discrimination argued on Hicks' behalf. (*Id.*; II JA 466-79.)

The Unions' claimed non-discriminatory reason for this position was that black employees' grievances could be resolved more easily by relying on other provisions of the collective bargaining agreement because raising the issue of racial

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District Court concluded that the Unions "knew that blacks were being discharged by Lukens at a disproportionately higher rate than whites" (Pet. App. 137a) and intentionally discriminated against black employees by failing to file grievances challenging that conduct. (Pet. App. 147a.)

15. Significantly, one of the areas in which Lukens was found to have discriminated against the plaintiff class was in denial of equal access to craft positions. (Pet. App. 79a-81a, 85a-90a, 146a-147a.)

discrimination caused the company to "get its back up" and made the grievance harder to settle. (Pet. App. 138a.) This explanation, however, could not withstand scrutiny, for the Unions had refused to invoke the non-discrimination clause even for members' complaints about racial harassment which did not otherwise violate the collective bargaining agreement. (*Id.*) Likewise, the Unions' refusal to address racial discrimination left the victims of discriminatory probationary discharges without *any* remedy because discrimination was the *only* ground on which probationary discharges could be challenged.[16]

Finally, the Unions' avoidance of racial issues also allowed the company to continue to ignore the pervasive discrimination and "served to perpetuate the discriminatory environment." (*Id.*) Thus, the Unions' policy allowed continuing and repeated violations of the non-discrimination provisions of the collective bargaining agreement, so its "tactical" justification for that policy was exposed as pretextual or, in the District Court's word, "unacceptable." (*Id.*) As the District Court concluded:

> The clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment. In short, the unions' unwillingness to assert racial discrimination claims as such rendered the non-discrimination clause in the collective bargaining agreement a dead letter.

(*Id.*)

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16. Contrary to the Unions' assertion, therefore, the District Court did not find that the Unions' approach "might achieve full vindication for individual grievances" (Unions' Brief 22) when the grievance involved racial harassment or probationary discharges. (Pet. App. 138a.) Moreover, the Unions in the present case filed numerous grievances which were not on behalf of any individual employee. Indeed, more than 37% of the cases heard in arbitration involved non-individual grievances. *See* N.T. 25.118-19; *compare* Unions' Exhibit 702 *with* Unions' Exhibit 704A. There is no evidence that the Unions ever filed a non-individual grievance over racial discrimination. Nor do the numbers of individual grievances filed or won in arbitration give any support to the Unions' position. As the District Court found, those numbers are subject to different, conflicting explanations, making the evidence "inconclusive on this issue". (Pet. App. 136a-137a.)

This case, then, involves the deliberate decision by the Unions, in the face of known racial discrimination at Lukens, to avoid raising claims involving an alleged breach of the non-discrimination provisions of the collective bargaining agreement. Moreover, the Unions' practice of avoiding charges of racial discrimination was not based on a belief that such charges lacked credibility. To the contrary, the Unions decided not to process racial discrimination claims—"even though the union itself believed that racial discrimination was involved in the grievance" (Pet. App. 138a)—"either so as not to antagonize the employer and thus increase [their] chances of success on other issues, or in deference to the perceived desires of [their] white membership" (Pet. App. 139a-140a). There is no evidence that the Unions were similarly reluctant to assert any other type of grievance.

SUMMARY OF THE ARGUMENT

The Unions were well aware of the wide-ranging racial discrimination in which Lukens engaged. The Unions were also vested, under the non-discrimination provisions of their collective bargaining agreement, with the power to grieve such racial discrimination. The Unions, however, deliberately chose to avoid attempting to enforce those non-discrimination provisions. The Unions' failure to enforce those provisions did not arise from lethargy or inadvertence or a disbelief in the validity of their members' complaints of racial discrimination. Rather, the Unions made a deliberate policy decision based on their admitted concern that raising the issue of *racial* discrimination tended to upset the employer. Thus, the Unions' deep-seated reluctance to challenge violations of the collective bargaining agreements' non-discrimination provisions arose from the fact that the *issue of race* was involved.

There is no evidence that the Unions similarly avoided enforcing any other provision of the collective bargaining agreement. Indeed, the Unions filed thousands of grievances asserting violations of other collective bargaining agreement provisions. The bottom line is that in carrying out their grievance processing function the Unions treated complaints of

racial discrimination differently from complaints alleging other violations of the collective bargaining agreement. Such disparate treatment employing a race-based classification violates Title VII's prohibition against union discrimination.

This conclusion is wholly consistent with federal labor policy. The decisions of the District Court and Court of Appeals in this case do not hold unions responsible for employer discrimination; nor do they require unions to fight employer discrimination in the abstract. They do not impose on unions any new affirmative obligation. They simply hold that unions may not systematically treat complaints of employer racial discrimination differently from other complaints by their members.

Similarly, the Unions violated Section 1981 because they treated contract terms enacted for the benefit of minority employees differently from other contract terms and thus denied to black employees the same rights to contract enforcement as white employees enjoyed. Unlike the employers in *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982), the Unions in this case were well aware of employer discrimination. Equally important, unions have a very different relationship to employees than employers have. Unlike an employer, such as the petitioners in *General Building Contractors*, a union's function is to provide *representation* for employees and to press their claims with their employer. Thus, a union, like the Petitioners in this case, which makes a distinction in the handling of employees' claims, depending on whether or not those claims allege racial discrimination, is not simply failing to challenge employer discrimination but is itself actively discriminating in the performance of its duties.

ARGUMENT

I. The Unions Violated Title VII.

A. Title VII Forbids Racial Discrimination By Unions.

In enacting Title VII, Congress recognized the importance of prohibiting racial discrimination not only by employ-

ers, but also by labor unions, in order to create a working environment wholly free from discrimination. Congress, therefore, enacted three provisions prohibiting racial discrimination in any form by labor organizations. These provisions, set forth in section 703(c) of Title VII, make it unlawful for a union:

> (1) . . . to discriminate against any individual because of his race . . .;
>
> (2) to . . . classify its membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee . . . because of such individual's race . . .;
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2(c).

These provisions must be understood in light of the relationship between a union and the employees who are members of the bargaining unit. As the Government explains, "a union exists *to represent* the bargaining unit employees' interests and *to press their claims* with the employer." (U.S. Brief 20 (emphasis added).)

Traditionally, this representative function involves two primary modes. The first, collective bargaining, is not directly at issue in this case. The second comprises efforts to enforce—through the grievance procedure—the agreements reached during collective bargaining. If Title VII's prohibition on union discrimination is to be given meaning, a union may not discriminate in performing (or refusing to perform) this second representative function of enforcing its members' rights under the collective bargaining agreement.

In their brief, the Unions inexplicably assert that "§§ 703(c)(1) and (c)(2) . . . have no application here" (Unions' Brief 26), and base their argument almost entirely on § 703(c)(3). While the District Court did not specify the paragraph of § 703(c) upon which it relied, the Court of

Appeals concluded that the Unions' conduct violated the general prohibition of § 703(c)(1) against discrimination. (Pet. App. 26a.)[17] The holding before this Court, therefore, is the conclusion of the Court of Appeals that the Unions' conduct in intentionally failing to raise grievances involving racial discrimination constituted discrimination by the Unions on the basis of race in violation of § 703(c)(1).

B. A Union Unlawfully Discriminates When It Treats Grievances Alleging Racial Discrimination Differently From Other Grievances.

"Discrimination" means "a distinction in treatment" or "different treatment." 110 Cong. Rec. 5863-64 (1964) (remarks of Sen. Humphrey) (quoted in Unions' Brief 26-27 n.22).

In claiming that the Unions have not "discriminated" within the meaning of Title VII, the Unions and the Government overlook the fundamental fact that the Unions have *classified grievances according to race*. They have singled out for different treatment those grievances which allege racial discrimination by the employer; in the words of the District Court, they have been "reluctant to assert" such grievances. (Pet. App. 138a.) Accordingly, this case is governed by the principles enunciated in this Court's cases holding that governmental actions which single out efforts to achieve racial equality, and place unique impediments in the way of such efforts, discriminate on racial grounds in violation of the Fourteenth Amendment. *See, e.g., Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969).[18]

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17. The Unions' entire discussion of § 703(c)(1) is limited to a single footnote, in which the Unions dismiss the Court of Appeals' reliance on § 703(c)(1) as "no more than a play on words [that] does not bear analysis." (Unions' Brief 26.)

18. Significantly, the Government asserts that a union's relationship to its members resembles a "limited purpose governmental unit". (U.S. Brief 20, *citing Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944).) The Government further admits, "Of course, *like a governmental unit*, if a union intentionally discriminates it is rightly subject to liability and sanctions." (U.S. Brief 21 (citation omitted) (emphasis added).)

Hunter involved an amendment to the Charter of the City of Akron (Section 137) which suspended the City's fair housing ordinance and required the approval of the electors before any such ordinance could be effective in the future. In holding that Section 137 violated the Equal Protection clause of the Fourteenth Amendment, this Court described the effect of Section 137 as follows:

> Section 137 thus drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discrimination in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends. Those who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule.
>
> * * *
>
> The Akron charter obviously made it substantially more difficult to secure enactment of ordinances subject to § 137.
>
> Only laws to end housing discrimination based on "race, color, religion, national origin or ancestry" must run § 137's gantlet.

393 U.S. at 390. Similarly, in the present case, the Unions' reluctance to assert discrimination grievances drew a distinction between blacks who sought to enforce the contractual prohibition against racial discrimination and employees who sought to use the grievance process "in the pursuit of other ends." (*Id.*) The Unions adduced no evidence that they were reluctant to assert any kind of grievance claim other than racial discrimination; indeed, the 8,000 grievances they filed belie any such claim. (Pet. App. 135a.) The Unions' policy, like Section 137, "places special burdens on racial minorities within the governmental [or grievance] process." 393 U.S. at 391.

In *Washington v. Seattle School District*, this Court struck down a Washington state statute, adopted through initiative, which removed from school boards the power to use mandatory busing for the purpose of racial integration but allowed school boards to use mandatory busing for other pur-

poses. This Court held that the statute was discriminatory and violated the Fourteenth Amendment because "it uses the racial nature of an issue to define the governmental decision-making structure, and thus imposes substantial and unique burdens on racial minorities." 458 U.S. at 470. Similarly, the Unions in the present case used "the racial nature of an issue" as a criterion in asserting grievances; they imposed "substantial and unique burdens on racial minorities" by their reluctance to process grievances against racial discrimination.

It is significant that this Court found that the governmental entities in the *Hunter* and *Seattle School District* cases had engaged in racial discrimination by changing their procedures for certain desegregation actions even though the Constitution did not compel them to take those actions.[19] Similarly, even if Title VII (and Section 1981) did not require the Unions to challenge racial discrimination in the abstract, the Unions discriminated in violation of Title VII (and Section 1981) by intentionally treating racial discrimination grievances differently from other grievances under the collective bargaining agreement.

Hunter and *Seattle School District* also answer the contention of the Unions and the Government that the Unions lacked the intent necessary for their actions to constitute discriminatory treatment in violation of Title VII (and Section 1981). In *Seattle School District*, this Court acknowledged the holdings of *Washington v. Davis*, 426 U.S. 229 (1976), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), that disparate impact is not alone enough to constitute a violation of the Fourteenth Amendment. 458 U.S. at 484-85. It held, however, that the necessary intent is satisfactorily established when the challenged act embodies an explicit racial classification:

> We have not insisted on a particularized inquiry into motivation in all equal protection cases: "A racial classification, regardless of purported motivation, is pre-

19. The school desegregation plans involved in *Seattle School District* were voluntarily adopted by the cities of Seattle, Tacoma and Pasco, 458 U.S. at 460-462, 464 n.7, and the district court in that case made no findings of *de jure* segregation, *id.* at 464 n.8.

sumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S., at 272. . . . And legislation of the kind challenged in *Hunter* similarly falls into an inherently suspect category.

There is one immediate and crucial difference between *Hunter* and the cases cited by appellants. While decisions such as *Washington v. Davis* and *Arlington Heights [v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977),] considered classifications facially unrelated to race, the charter amendment at issue in *Hunter* dealt in explicitly racial terms with legislation designed to benefit minorities "as minorities," not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented. This does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification. See *Crawford v. Los Angeles Board of Education*, 458 U.S. 527 [1982]. . . . But when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.' " *James v. Valtierra*, 402 U.S. [137,] 141 [(1971),] . . . quoting *Hunter v. Erickson*, 393 U.S., at 391.

458 U.S. at 485-86 (footnotes omitted).

In the present case, the Unions' policy to avoid asserting violations of the non-discrimination provisions is precisely the type of explicit racial classification involved in *Seattle School District*. The Unions admit that their policy of reluctance to grieve racial discrimination was based on concern about Lukens' reaction to *the racial nature of the grievances*. (Unions' Brief 9-10.) The Unions thus had the intent to treat certain grievances—those charging racial discrimination—differently from other grievances, because of the issue of race.[20] In short, the Unions intentionally made a distinction

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20. As the Unions concede, if a union has " 'take[n] [race] into ac-

in treatment based on race. *Cf. Lee v. Nyquist*, 318 F. Supp. 710, 718 (W.D.N.Y. 1970) (three-judge court) ("the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area") (footnote omitted), *aff'd mem.*, 402 U.S. 935 (1971), quoted and followed in *Seattle School District*, 458 U.S. at 468-69. Thus, the Unions intentionally discriminated on the basis of race.[21]

While the Unions' practice of not filing *any* grievances over probationary discharges might *seem* to be facially neutral, that apparent neutrality disappears when it is recognized that the *only* ground on which such discharges could be the subject of a grievance is discrimination.[22] Thus, the Unions' refusal to file grievances over probationary discharges is displayed as simply an element of the Unions' admitted practice of reluctance to assert grievances of racial discrimination.

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count' . . . . [s]uch an action would constitute intentional discrimination by the union" (Unions' Brief 29 n.25 (first two brackets in original), *quoting McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285 (1976)).

21. This Court has held that a classification based explicitly on race is discriminatory, even if created with a "preferential purpose". In *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978), this Court held:

> If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

22. Similarly, while the Government argues that the Unions' decision not to enforce the non-discrimination provisions of the collective bargaining agreement "applied equally to black and white employees" (U.S. Brief 8), "the reality is that the [decision's] impact falls on the minority." *Hunter v. Erickson*, 393 U.S. at 391. There is no evidence that Lukens discriminated against white employees, or that any white employees asked the Unions to file grievances alleging race discrimination. Moreover, even if such evidence existed, this Court has already rejected the argument that policies based on race that affect both blacks and whites are not discriminatory. In *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), this Court held, "Although a ban on intermarriage or interracial dating applies to all races, decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination." *Id.* at 605 (citations omitted). *See also Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

The Unions' excuse for this conduct is that the assertion of racial discrimination in grievances tends to stiffen the company's resistance and make grievances harder to settle. In light of the paucity of their grievances alleging racial discrimination, it is hard to understand what basis they had for this belief. Even if it is true, however, it does not justify their conduct. Avoidance of racial conflict or other effects of racial prejudice is not a sufficient justification for denying minorities their rights. Thus, in *Palmore v. Sidoti*, 466 U.S. 429 (1984), this Court unanimously reversed a Florida court's decision removing a white child from the custody of its mother because she had married a black man. This Court rejected the Florida court's rationale that the social stigma borne by an interracial family would be harmful to the child. It acknowledged "the reality of private biases and the possible injury they might inflict" but held, "The Constitution cannot control such prejudices but neither can it tolerate them." 466 U.S. at 429. *See also Buchanan v. Warley*, 245 U.S. 60, 81 (1917).

It is also significant that Title VII goes beyond the Fourteenth Amendment in its prohibition of such racial classifications. Under the Fourteenth Amendment, "[s]uch classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose." *Palmore v. Sidoti*, 466 U.S. at 432-33 (citations omitted). Title VII, however, prohibits racial classifications without qualification.[23] Not only does it forbid unions to discriminate on the basis of race or color, but also it explicitly forbids a union "to classify its membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee" because of race or color. Section 703(c)(2), 42 U.S.C. § 2000e-2(c)(2). Thus, even a "compelling . . . interest" cannot justify the Unions' inten-

23. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices").

tional differentiation between grievances involving racial matters and those involving other concerns.[24]

In a finding not alleged to be clearly erroneous, the District Court concluded that "[t]he clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment." (Pet. App. 138a.) Thus, the Unions' open and deliberate policy of avoiding enforcement of the non-discrimination provisions of the collective bargaining agreement constituted disparate treatment which limited black employees' employment opportunities and adversely affected their status as employees because of their race.[25]

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24. Both the Unions and the Government base their entire arguments regarding the meaning of Title VII on § 703(c)(3), which states that a union must not "cause or attempt to cause an employer to discriminate against an individual in violation of this section." 42 U.S.C. § 2000e-2(c)(3). The Unions beg the question by asserting that Sections 703(c)(1) and (c)(2) "do not address the question of union responsibility for employer discrimination—the issue presented by this case. That issue is addressed expressly and exclusively by § 703(c)(3)." (Unions' Brief 26 (footnote omitted).) The Unions simply misstate the issue in this case. The issue here is not "union responsibility for employer discrimination"; rather, it is the Unions' responsibility for their *own* racial discrimination in classifying the provisions of the collective bargaining agreement for differential enforcement to the detriment of their black members.

Even if one considers only the provisions of § 703(c)(3), however, the Unions violated Title VII by intentionally treating violations of the non-discrimination provisions differently from other grievances. The Unions urge that the legislative history of one provision of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(2), describes "precisely what Congress had in mind" (Unions' Brief 32) in selecting the phrase "to cause or attempt to cause". Yet, according to the colloquy quoted by the Unions, the prohibitions against a union under this language would apply not only to new agreements, "but to an existing agreement where a labor organization would *attempt to maintain* a discriminatory pattern in an old agreement and resist efforts to change to the pattern required by this act." 109 Cong. Rec. 9209 (1963), *quoted at* Unions' Brief 33 (emphasis added). If a union "attempt[s] to cause" employer discrimination by "attempt[ing] to maintain" a discriminatory pattern in an old agreement, surely a union must "cause or attempt to cause" employer discrimination by implementing policies which, as the District Court found, "serve[ ] *to perpetuate* the discriminatory environment." (Pet. App. 138a (emphasis added).)

25. The Government is also wrong in claiming that the District Court's

C. The Ruling of the Courts Below Is Consistent With Federal Labor Policy.

In order to exaggerate the impact of the lower courts' decisions in this case, the Unions erroneously stretch those decisions far beyond their terms. Thus, the Unions argue extensively that Title VII does not impose "an affirmative duty on unions to combat employer discrimination" (Unions' Brief 34), and that the imposition of such a duty "would be destructive of the system of collective bargaining established by the national labor laws" (Unions' Brief 35). But the question of whether such a broad duty exists is simply not raised by the facts of this case, which presents a far narrower issue than the Unions claim. Therefore, in assessing whether the rulings below are consistent with "national labor policy", the Unions' arguments must be narrowed in two respects: (1)

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decision did not amount to a finding of disparate impact. (U.S. Brief 8-10 & n.7.) Having found a disparate treatment violation by the Unions, it was not necessary for the District Court to address the evidence explicitly in terms of disparate impact. The Court's findings, however, plainly cover disparate impact. The District Court found that the Unions' reluctance to grieve racial discrimination "served to perpetuate the discriminatory environment" (Pet. App. 138a), and thus had a disparate impact on black employees at Lukens. In this respect, this Court has already noted that the significance of an individual discrimination grievance is far broader than the particular requested relief. In *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975), this Court stated:

> Nor is there any reason to believe that the processing of grievances is inherently limited to the correction of individual cases of discrimination .... [O]ne would hardly expect an employer to continue in effect an employment practice that routinely results in adverse arbitral decisions.

Id. at 66-67 (footnote omitted).

The District Court also found disparate impact when it found that blacks were discharged during their probationary period at a disproportionate rate, and the Unions knew this but refused to make use of the nondiscrimination provisions of the collective bargaining agreement to challenge it. (Pet. App. 137a.)

The District Court also considered and rejected the Unions' claimed "business necessity" (or "union necessity") reason for the disparate impact. (Pet. App. 138a.) The Unions have never claimed that the seniority system had any impact on their processing of race discrimination grievances, and it is hard to see how it could have any impact.

with respect to the *cause* of the Unions' failure to protest employer racial discrimination, and (2) with respect to the type of union activity—collective bargaining or processing grievances—involved.

First, there are several possible reasons for a union's failure to combat racial discrimination. A union may place a numerical limit on the number of grievances it can handle in a given time period and apply that limit across the board. A union may conclude that it will only grieve violations of one contract provision and refuse to grieve *all* others, including racial discrimination. Or a union may simply fail to grieve racial discrimination grievances inadvertently.

It is not necessary in this case to reach the broad issue of whether a union is *always* liable under Title VII for failure to combat employer discrimination *for any reason.*[26] For here,

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26. Although the present case involves more than "mere acquiescence" on the part of the Unions (Pet. App. 26a), a union is also liable under Title VII if it fails to take affirmative steps to combat known employer discrimination. *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973). Given its representational role in both bargaining and grieving, a union which acquiesces in employer discrimination discriminates against black members of the bargaining unit by failing to represent their interests in a matter which significantly affects the members' employment opportunities. Most courts faced with this issue have so held. *See Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 807 F.2d 330, 338 (3d Cir. 1986); *Howard v. International Molders Union, Local 100*, 779 F.2d 1546, 1553 (11th Cir.), *cert. denied*, 106 S. Ct. 2902 (1986); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 868 (7th Cir. 1985); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1304 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984); *Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1104 (6th Cir. 1981); *Romero v. Union Pacific R.R.*, 615 F.2d 1303, 1310-1311 (10th Cir. 1980); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1384 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 174 n.15 (D.C. Cir. 1976); *Smith v. South Cent. Bell Tel. Co.*, 518 F.2d 68, 70 (6th Cir. 1975); *Egger v. Local 276, Plumbers & Pipefitters Union*, 644 F. Supp. 795, 802 (D. Mass. 1986); *Dickerson v. United States Steel Corp.*, 472 F. Supp. 1304, 1353-1354 (E.D. Pa. 1978), opinion on motion to dismiss, 439 F. Supp. 55, 62-63, 83 (1977); *United States v. Buffalo*, 457 F. Supp. 612, 639 (W.D.N.Y. 1978); *Lewis v. Bethlehem Steel Corp.*, 440 F. Supp. 949, 974 (D. Md. 1977); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 283 (N.D. Ind. 1977); *Hairston v. McLean Trucking Co.*, 62

both the District Court and the Court of Appeals found that the Unions had not failed to act out of inadvertence or as part of a non-discriminatory policy applied equally to all types of grievances. To the contrary, the lower courts found that the Unions intentionally failed to prosecute grievances raising racial issues "either so as not to antagonize the employer and thus improve [their] chances of success on other issues, or in deference to the perceived desires of [their] white membership." (Pet. App. 139a-140a.)[27] The Unions' arguments about national labor policy must be considered, not in the extreme case of union inadvertence or non-discriminatory selection of grievances, but in the context of this case, in which the Unions made the deliberate decision not to press racial grievances simply because of their racial character.[28]

Second, in their discussions of national labor policy, the Unions incorrectly focus on their obligations in collective bargaining. The District Court did not find that the Unions

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F.R.D. 642, 660, 673-675 (M.D.N.C. 1972), *vacated on other grounds*, 520 F.2d 226 (4th Cir. 1975). *See also McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285 (1976) (reversing district court's dismissal of Title VII claim against a union which allegedly "acquiesced and/or joined in" the employer's alleged racial discrimination).

The EEOC has concluded that "[i]n the absence of evidence that the union actively opposed inclusion of the unlawful [discriminatory] provisions in the [collective bargaining] agreement . . . the union has engaged in unlawful employment practices within the meaning of Section 703(c) of Title VII." EEOC Decision No. 71362, 2 F.E.P. Cases 1086, 1088 (Oct. 22, 1970).

27. Although the Unions and Government emphasize the statement in the opinions of the courts below that "mere passivity" on the part of unions in the face of employer discrimination violates Title VII (Unions' Brief 18, 21; U.S. Brief 4), neither of the courts below relied on that general statement as a basis for its holding in this case. To the contrary, the District Court held that "the evidence in this case proves far more than mere passivity on the part of the unions." (Pet. App. 139a.) Similarly, the Court of Appeals noted that "[t]he case against the unions here is stronger than one of mere acquiescence." (Pet. App. 26a.)

28. Nor does this case involve the issue of whether a union is liable "for failing to *neutralize* an employer's discrimination." (U.S. Brief 23 (emphasis added).) Rather, the District Court found in this case that the Unions "almost never" even *attempted* to combat employer discrimination by asserting racial discrimination grievances. (Pet. App. 138a.)

were liable for failing to negotiate against Lukens' discriminatory practices at the bargaining table. Rather, the District Court's finding was based centrally on the Unions' repeated failures "to include racial discrimination as a basis for grievances or other complaints against the company." (Pet. App. 137a.)[29]

The national labor policy implications of the lower courts' holdings must therefore be addressed with respect to the precise issue raised by this case: Does a union violate Title VII by deliberately treating the non-discrimination provisions of its collective bargaining agreement differently from other provisions, so that it intentionally avoids filing grievances for racial discrimination even though many of its members complain of widespread employer racial discrimination and the union's conduct serves to perpetuate a racially discriminatory environment?[30]

In a leading case involving the relationship between a union and its members, this Court stated that a union has obligations in representing its members parallel to those of a

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29. As noted by one commentator in analyzing a union's liability under Title VII, "[t]he process of negotiation is much more complex, involving as it does questions of majority rule and the give and take of bargaining, than the administration of grievances. The union's obligation, and therefore its potential liability, is much clearer in grievance processing." Larson, *Employment Discrimination*, ¶ 44.50, 9-39 (1983) (footnote omitted).

30. A non-discrimination provision is a frequent feature of collective bargaining agreements. According to an analysis made by one author, approximately 84% of the collective bargaining agreements on file with the Bureau of National Affairs in 1979 contained general non-discrimination provisions, an increase from 28% in 1965, 46% in 1970, and 74% in 1975. Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 712 n.60 (1980).

After the Court of Appeals' decision in this case, the Third Circuit again relied upon the existence of a non-discrimination provision in the collective bargaining agreement in recognizing the obligations which Title VII imposes on a union with respect to employer discrimination. In *Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 807 F.2d 330 (3d Cir. 1986), the Court held that, if a union learns of discrimination by the employer, "it will owe an affirmative duty to its minority members to take action against the offending employer or employers to enforce the non-discrimination provisions of its collective bargaining agreements." *Id.* at 338.

government representing its citizens. In *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944), this Court held that a union

> is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.

323 U.S. at 198. Turning to the legislative scheme established by Congress to regulate labor unions, the Court concluded that:

> the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.

Id. at 202.[31] Thus, in creating the duty of fair representation in *Steele*, this Court recognized that, while a union may be a "majoritarian organization" (Unions' Brief 45), it does not have plenary power to represent solely the interests of the majority, but is "under an affirmative . . . duty equally to protect [the] rights" of minority members of the bargaining unit.

The foundations and extent of this duty are spelled out in a recent decision upon which both the Unions and the Government rely: *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975). In that case, this Court stated, "Plainly, national labor policy embodies the principles of nondiscrimination as a matter of highest priority . . . ." 420 U.S. at 66 (citations omitted). Nevertheless, it held that minority employees with complaints of racial discrimination are not protected by the National Labor Relations Act when they organize to bargain with their employer *independently* of their union. Rather, this Court held that they were

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31. In *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953), the Court held that unions owe a similar duty of fair representation under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

required to proceed through established union channels to seek the relief they were demanding, and the union, "as representative of *all* [collective bargaining] unit employees", had a corresponding "duty fairly and in good faith to represent the interests of minorities within the unit." 420 U.S. at 64 (emphasis in original). The Court noted:

> The collective-bargaining agreement involved here prohibited without qualification all manner of invidious discrimination and made any claimed violation a grievable issue. The grievance procedure is directed precisely at determining whether discrimination has occurred.

420 U.S. at 66 (footnote omitted).

If the union could ignore such non-discrimination provisions at will, as the Unions and the Government argue in the present case, the provisions themselves would be of scant use to minority employees, and this Court's discussion of the channels available to minority employees for protesting discrimination through grievances would provide little comfort to these employees. Indeed, this Court expressly stated:

> When union and employer are not responsive to their legal obligations, the bargain they have struck must yield *pro tanto* to the law, whether by means of conciliation through the offices of the EEOC, or by means of federal-court enforcement at the instance of either that agency or the party claiming to be aggrieved.

420 U.S. at 70.

Thus, in accommodating the goals of Title VII and the national labor policy, this Court has recognized that non-discrimination principles are "a matter of highest priority" for national labor policy, that unions have a responsibility to represent the interests of minorities through the grievance process, and that they can be held accountable "through the offices of the EEOC, or by means of federal-court enforcement" for failing to fulfill that responsibility.

The holding of the Court of Appeals in the present case goes no further. A union's reason for existence, as stated by the Government, is "to represent the bargaining unit employ-

ees' interests and to press their claims with the employer." (U.S. Brief 20.) By their reluctance to fulfill these functions with respect to complaints of racial discrimination—and only racial discrimination—the Unions at Lukens denied their minority members equal access to, and protection of, the sole mechanism for enforcing their contractual rights, the grievance system. *Cf. Washington v. Seattle School District No. 1*, 458 U.S. 457, 470 (1982); *Hunter v. Erickson*, 393 U.S. 385, 390 (1969).

The Unions assert that the policy considerations underlying the NLRA allow unions to "determine their own bargaining agendas and their own priorities" (Unions' Brief 37), and that Title VII does not impose a duty on unions to take certain substantive positions such as opposing employer discrimination (Unions' Brief 36-39). Obviously, there may be situations in which unions cannot assert all grievances presented to them, and unions must establish priorities to select some grievances for prosecution and not others. The District Court and Court of Appeals in this case did not base their holdings on the assumption that Title VII requires that unions *always* raise grievances involving racial discrimination by the employer or that this type of grievance be given special priority.[32] For example, a grievance that appears to lack merit may be rejected by a union whether it raises racial discrimination issues or other issues. Title VII does, however, forbid unions to systematically treat grievances differently on the basis of the racial nature of the grievance.[33]

This Court has already rejected the argument that a union's discretion to select among the interests of its members is not restrained by Title VII. In *McDonald v. Santa Fe Trail*

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32. Contrary to the Unions' assertion (Unions' Brief 41), the holdings of the lower courts in this case do not impose any obligation on unions to take a substantive position opposed to racial discrimination. Rather, they hold only that the Unions must treat their members' existing contractual rights to be free from racial discrimination the same as they treat their members' other contractual rights.

33. Even accepting the Government's argument that "Congress in Title VII did not seek . . . to require that certain claimants get preferential treatment" (U.S. Brief 21), Title VII must mean at least that claimants shall not receive *inferior* treatment because their grievances raise racial issues.

Transportation Co., 427 U.S. 273 (1976), the union argued in defense to a Title VII claim that "in representing all the affected employees in their relations with their employer, the union may necessarily have to compromise by [protecting the interests] of only some." *Id.* at 284-85. This Court rejected that argument, holding that "whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them." *Id.* at 285.[34]

The Unions also argue that Congress gave employees the right to enforce their Title VII substantive rights by filing a claim with the EEOC or suing their employer in federal court, so Congress could not have intended that unions be obligated "to spend scarce resources processing grievances that, if successful, will only *replicate* remedies that are available to the affected employees under Title VII." (Unions' Brief 41 (emphasis in original).)[35] An individual's remedy for employer discrimination under Title VII through the EEOC and federal court litigation, however, is not identical to the grievance-arbitration mechanism for violations of a non-discrimination provision in the collective bargaining agreement. The EEOC/litigation route is more time-consuming and may impose sig-

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34. This Court has also recently reaffirmed the principle that even a government official ordinarily cloaked with broad discretion has discriminated if he or she has made decisions based on racial factors. In *Batson v. Kentucky*, 106 S. Ct. 1712 (1986), this Court held:

> [T]he component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause. Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race . . . .

Id. at 1718-19 (footnote and citations omitted). *See also Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 485 (1982); *Hunter v. Erickson*, 393 U.S. 385, 390-91 (1969).

35. Similarly, the Government argues that "it is quite unnecessary" to require unions to press their members' discrimination claims against the employer, because the members can bring their own lawsuit under Title VII. (U.S. Brief 24.)

nificantly higher costs on the employee than the grievance-arbitration mechanism.[36] For a union to be permitted to ignore violations of a non-discrimination clause simply because the employee may have another, more difficult, mechanism for remedying the employer's discrimination, would allow the union to "impose[ ] substantial and unique burdens on racial minorities", *Washington v. Seattle School District No. 1*, 458 U.S. at 470, and would "render[ ] the non-discrimination clause in the collective bargaining agreement a dead letter" (Pet. App. 138a). This would also contravene Congress's determination that "the policy against discrimination . . . be of the 'highest priority' ". *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), *quoting Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).[37]

Moreover, as discussed above, Title VII requires that a union not discriminate in its enforcement of the various provisions of the collective bargaining agreement, including non-discrimination provisions. That the members of the bargaining unit also have an independent right to protest employer

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36. *Compare Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465 & n. 11 (1975) (noting the "significant delays that have attended administrative proceedings in the EEOC" and the "expensive litigation" that may be involved in prosecuting a Title VII claim), *with Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 55 (1974) ("the grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices").

37. As observed in *Alexander v. Gardner-Denver Co.*, "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." 415 U.S. at 47 (footnote omitted). In *Alexander*, a case which "concern[ed] the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities under Title VII", *id.* at 38, this Court stated that "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination," *id.* at 48-49, and held that an employee has a right to a trial *de novo* in a federal court on his Title VII claims, even if he has already pursued through arbitration a claim under the non-discrimination clause of the collective-bargaining agreement. *Id.* at 59-60. The arguments of the Unions and the Government would have this Court overrule *Alexander* by holding that Title VII supplanted black employees' NLRA right to fair representation in grievance processing.

discrimination through the EEOC and federal court litigation does not remove the union's obligation under Title VII to represent its members without discrimination, *i.e.*, without taking racial issues into consideration, in deciding whether to enforce their contractual rights under the collective bargaining agreement.[38]

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38. Bargaining unit members have two mechanisms through which they can protest racial discrimination by their union. First, as this case shows, union members can file an EEOC charge against the union alleging discrimination under Title VII and a subsequent lawsuit against the union under both Title VII and Section 1981. Second, the union member may have a claim against his union for breach of its duty of fair representation. *See Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). In the landmark case of *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court held: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190. A breach of the duty of fair representation is an unfair labor practice and may be presented to the NLRB, *see, e.g., Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *Independent Metal Workers, Locals 1 & 2 (Hughes Tool Co.)*, 147 N.L.R.B. 1573 (1964), cited with approval in *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. at 64, or to the court under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, *Vaca v. Sipes*, 386 U.S. at 186-87; *Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81, 86-88 (3d Cir. 1982).

Several courts have concluded that the *Vaca* duty of fair representation standard applies in a Title VII case against a union, *see, e.g., Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1104 (6th Cir. 1981); *Causey v. Ford Motor Co.*, 516 F.2d 416, 424-25 (5th Cir. 1975); *Woods v. North Am. Rockwell Corp.*, 480 F.2d 644, 647-48 (10th Cir. 1973), and a leading commentator has concluded that "[b]ecause almost every conceivable grievance administration case under Title VII is in the context of disparate treatment (or pattern or practice), application of the *Vaca* standard should result in a proper holding under accepted principles of Title VII practice." Larson, *Employment Discrimination* ¶ 44.80, 9-48 (1983). *See* Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 710 (1980) ("It follows directly from *Vaca* that a union that remains passive in the face of a grievance alleging employer discrimination breaches the duty of fair representation unless its decision not to process the grievance was both rational and free of any bad faith or discriminatory purpose").

In holding that the Unions in the present case had violated Title VII, the Court of Appeals concluded that the Unions had also violated their duty of fair representation (Pet. App. 26a). (The court's conclusion with respect to the duty of fair representation does not constitute an independent ground of liability because the plaintiffs did not plead any LMRA claim.)

Significantly, the Unions' position in this case is contradicted by the conduct of the United Steelworkers International Union itself in bargaining for three separate non-discrimination provisions in the collective bargaining agreement. The purpose of negotiating provisions in a collective bargaining agreement is to establish rights that a union may enforce against the employer. If a union is acting in good faith, it makes no sense for it to obtain such rights and then refuse to enforce them.[39]

The Government also appears to assume that a union is permitted under Title VII to treat the non-discrimination provisions of a collective bargaining agreement differently from other provisions. In rejecting the holdings of the lower courts in this case, the Government argues:

> Ironically, the more discriminatory an employer's conduct, the more a union would have to concentrate its demands on the issue of discrimination, and the weaker it would be in all other bargaining areas.

(U.S. Brief 19 n.15.) Applying this argument to the precise issue raised in this case, it is hard to see how it is "ironic" to require a union to process more racial discrimination grievances in response to an increase in racial discrimination by the employer. If an employer's conduct systematically violates the seniority rights of employees, for example, one would expect the union "to concentrate its demands on the issue" of seniority and file more grievances involving breaches of the seniority provisions of the collective bargaining agreement. If a union treats grievances raising racial discrimination the same way as grievances involving other violations of the collective bargaining agreement, of course the union will file more grievances against employer discrimination the more the employer breaches the non-discrimination provisions. Title VII requires that a union respond to an employer's violations of the non-discrimination provisions of the collective

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39. As the Unions pointed out in their Brief, "a union that succeeds in obtaining any [non-discrimination] contract provisions may thereafter have to expend its resources in the grievance/arbitration procedure *in order to achieve any meaningful results*." (Unions' Brief 40 (emphasis added).)

bargaining agreement under the same standards as it responds to the employer's violations of other provisions of the agreement.[40]

The holding of the courts below is therefore consistent with national labor policy. By prohibiting unions from discriminating against their minority members in all matters, Section 703(c)(1) of Title VII does not interfere with the framework in which unions and employers bargain and enforce their bargains. Rather, Title VII permits a union to decide which grievances to pursue and which not to pursue, as long as that decision is not based on racial factors.

II. The Unions Violated Section 1981.

The District Court held the Unions liable under Section 1981 because the Unions *intentionally* chose to treat claimed violations of the contractual non-discrimination provisions differently from alleged violations of other collective bargaining agreement provisions. The Unions claim that this holding is contrary to this Court's opinion in *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982). (Unions' Brief 45-48.) In making this argument, the Unions ignore the language of Section 1981 and fail to acknowledge the central distinctions between the facts in *General Building Contractors* and the facts as found by the District Court in this case.

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40. Both the Unions and the Government equate employees' Title VII rights with their rights under other statutes designed to benefit employees, such as the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. § 651 *et seq.* The Unions and Government then argue that just as unions have no obligation to enforce their members' rights under these statutes, unions have no obligation to enforce their members' Title VII rights. (Unions' Brief at 39-40; Government's Brief at 18-19 n.14.)

This argument misconstrues the holdings of the courts below, which imposed Title VII liability on the Unions for their own discrimination *in the enforcement of the collective bargaining agreement*, not for their failure to enforce their members' Title VII rights against Lukens. Without a provision in the collective bargaining agreement requiring that the employer comply with the terms of ERISA, OSHA or FLSA, a union would have no basis on which to enforce the employees' rights under these statutes through the grievance mechanism.

Section 1981 provides that "all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." When a collective bargaining agreement contains a clause prohibiting racial discrimination, but a union, in the face of known employer discrimination, deliberately follows a policy against enforcing that provision, the union deprives the minority employees of the same right to enforce the collective bargaining agreement as is enjoyed by whites.[41] Therefore, a union's intentional decision to treat the provisions of its contract differently, by avoiding the enforcement—through grievances—of prohibitions on racial discrimination, subjects it to liability under Section 1981.[42]

The Unions' reliance on *General Building Contractors* to support their position is totally misplaced. In that case, the plaintiffs claimed that a union and a class of employers had discriminated in the operation of an exclusive hiring hall for construction industry workers. The district court found that the union had intentionally discriminated in its operation of the hiring hall, but found that the employers "did not intentionally discriminate against minority workers and neither knew nor had reason to know of the Union's discriminatory practices." 458 U.S. at 383. Nevertheless, the district court held that *both* the union and the employers were liable under

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41. As the District Court pointed out, "the unions' unwillingness to assert racial discrimination claims as such rendered the non-discrimination clause in the collective bargaining agreement a dead letter." (Pet. App. 138a.)

42. Even without a finding of "far more than mere passivity" on the part of a union (Pet. App. 139a), several federal courts have held that a union may be found liable under Section 1981 for failing to oppose employer discrimination. *See Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1304 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 993-94 (D.C. Cir. 1973); *Dickerson v. United States Steel Corp.*, 472 F. Supp. 1304, 1353 (E.D. Pa. 1978). As the court observed in *Dickerson*, "a union's acquiescence in discriminatory company conduct" is actionable under Section 1981 because a "union's failure . . . to protest discriminatory treatment is in itself discrimination." 472 F. Supp. at 1353. While plaintiffs agree with these decisions, the holdings of the lower courts in the present case are more limited.

Section 1981 for racial discrimination. The employers appealed the district court's holding,[43] and this Court reversed.

The basis for this Court's decision in *General Building Contractors* was the holding that disparate impact alone did not violate Section 1981. Rather, this Court held, Section 1981 proscribed only "purposeful" discrimination. 458 U.S. at 391. Recognizing the significance of the district court's factual finding that the employers had not intended to discriminate and neither knew nor should have known of the union's discrimination, and finding no other basis for the employers' Section 1981 liability, this Court reversed the district court's imposition of Section 1981 liability on the employers.[44]

The holding of *General Building Contractors* has no application to the facts of the instant case. The district court's finding that the employers in *General Building Contractors* were innocent of intentional discrimination and neither knew nor should have known of the union's discrimination was uncontested on appeal.[45] As this Court noted, " '[n]ot even acquiescence of the whole class of employers in the sense of a conscious toleration of the discrimination of the union ha[d] been shown' ", 458 U.S. at 382 n.7 (brackets in original), quoting the district court's opinion, *Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 469 F. Supp. 329, 413 (E.D. Pa. 1978).

By contrast, in the present case, the district court found that the Unions were fully aware of Lukens' discriminatory conduct, yet intentionally chose to discriminate by avoiding

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43. The Court of Appeals for the Third Circuit, sitting *en banc*, affirmed the judgment of the district court by an equally divided vote. 648 F.2d 923 (1981).

44. *General Building Contractors*' further holding that the defendant employers were not vicariously liable for the defendant union's intentional discrimination, 485 U.S. at 391-395, is of no relevance here. The plaintiffs here have never claimed that the Unions were vicariously liable for Lukens' intentional discrimination.

45. *See Pennsylvania v. Local 542, Int'l Union of Operating Engineers*, 569 F. Supp. 582, 587 (E.D. Pa. 1983) (interpreting *General Building Contractors* after remand).

grievances which sought to assert violations of the non-discrimination provisions of the collective bargaining agreement. As stated by the trial court, the Unions "intentionally avoid[ed] asserting discrimination claims" (Pet. App. 139a), "even though the union itself believed that racial discrimination was involved in the grievance" (Pet. App. 138a). With *both* the requisite awareness and intent, the Unions—unlike the employers in *General Building Contractors*—were properly found to have violated Section 1981.

Moreover, even if the employers in *General Building Contractors had* been aware of the union's discrimination, that case would not be relevant to the issue of the Unions' Section 1981 liability here. Whatever an *employer's* affirmative obligations to seek to protect its employees from a union's discrimination may be, a *union*—with extensive and recognized representational obligations to its members—may not discriminate on racial grounds in this representation. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 203 (1944). Indeed, the Government has explicitly recognized "the differing role and nature of employers and unions." (U.S. Brief 20.) As the Government states, "a union exists to represent the bargaining unit employees' interests and to press their claims with the employer." (*Id.*) An employer has no such responsibility. Thus, although an employer may have no duty to protect its employees from union discrimination, a union clearly has a responsibility to represent the interests of minority employees "and to press their claims with the employer" at least as vigorously as it presses other claimed violations of the collective bargaining agreement. Otherwise, it is violating Section 1981 by denying minority employees "the same right . . . to . . . enforce [the collective bargaining agreement] . . . as is enjoyed by white [employees]."

The policy considerations discussed with respect to the obligations imposed on unions under Title VII apply to Section 1981 as well.[46] Section 1981's mandate that minority

46. Several Courts of Appeals have noted that, in the employment discrimination context, the substantive standards for liability for intentional discrimination under Title VII and Section 1981 are generally the same. *See Whatley v. Skaggs Co.*, 707 F.2d 1129, 1139 (10th Cir.), *cert. denied*, 464

members of a union have the same right to enforce their collective bargaining agreement as is enjoyed by white members does not impose an obligation on the union to set any particular priorities. Nor does Section 1981 impose any additional enforcement obligations on a union. Rather, Section 1981 requires, as does Title VII, that in enforcing the terms of the collective bargaining agreement, a union not discriminate among the grievances raised by its members on the basis of whether the grievances involve issues of race.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals holding Petitioners United Steelworkers of America, AFL-CIO-CLC, and its Local Unions 1165 and 2295 liable to Respondents under Title VII and Section 1981 should be affirmed.

Respectfully submitted this 9th day of March, 1987.

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U.S. 938 (1983); *London v. Coopers & Lybrand*, 644 F.2d 811, 818 (9th Cir. 1981); *Scott v. Univ. of Delaware*, 601 F.2d 76, 80, n.2 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); *Carrian v. Yeshiva Univ.*, 535 F.2d 722, 729 (2d Cir. 1976). Therefore, the same acts and omissions of a union which give rise to Title VII liability also give rise to Section 1981 liability, if intentionally discriminatory, and the policy implications of holding the Unions liable under these two statutes in this case are the same.

FOR ARGUMENT

Supreme Court, U.S.
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No. 85-2010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *et al.*,
Petitioners,

v.

CHARLES GOODMAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Respondents' brief (1) mischaracterizes the nature of the issues in this case, and (2) misapprehends the applicable legal standards.

1. *Respondents' brief mischaracterizes the nature of the issues in this case.* Respondents' ("plaintiffs' ") brief asserts that this case is *not* about whether a union has an affirmative duty to combat employer discrimination. Rather, plaintiffs contend that the unions "treat[ed] the non-discrimination provisions of [the] collective bargaining agreement differently from other provisions" of the agreement (Resp. Br. at i), that in so doing the unions "classified grievances according to race" (*id.* at 17), and that, as a result, the unions imposed "substantial and unique burdens on racial minorities" (*id.* at 18), giving those minorities "inferior treatment because their grievances raise racial issues" (*id.* at 30 n.33).

Not one of the propositions in this litany is supported by the findings below or the evidence. The courts below found the unions liable not on the ground that the unions had themselves discriminated—as that term is ordinarily understood—but on the following basis: Title VII and 42 U.S.C. § 1981 impose on unions an affirmative duty to combat employer discrimination, and the reluctance of the unions here to base grievances on the non-discrimination clause of the contract was a failure to satisfy that duty—an intentional failure, given that the unions were aware of the employer discrimination. To be sure, the courts below called this failure "discrimination," but that label was predicated on the notion that the term "discrimination" encompasses the knowing failure of a union to combat employer discrimination. See *infra* at 14-16; see also U. Br. at 18-20, 26 n.26.

Plaintiffs are disingenuous in claiming otherwise. In their brief in the court of appeals, plaintiffs acknowledged that, given the findings of the district court, the unions'

liability in this case turns on whether either Title VII or § 1981 imposes an affirmative duty on unions to combat employer discrimination. Thus, plaintiffs' statement to the court below of the issues presented was, in pertinent part, as follows:

> 1. Did the district court commit reversible error in holding that a union may be held to violate 42 U.S.C. § 1981 and Title VII of the 1964 Civil Rights Act for intentionally failing to combat employer discrimination?
>
> 2. If the theory of liability referred to in paragraph 1 above is valid, did the district court commit reversible error in its finding that the Unions violated Section 1981 and Title VII by intentionally failing to combat employer discrimination? [1]

And in the body of their brief in the court below, having argued that "a union's failure to combat an employer's acts of race discrimination can render it liable under Title VII and Section 1981," [2] plaintiffs contended that "The District Court Properly Found That The Unions Violated Their Obligation To Combat Employer Discrimination" (*id* at 114). In this context, plaintiffs described the elements of the theory of union liability applied by the district court in this case:

> In determining whether a union is liable to a class under Title VII and Section 1981 for not combatting

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[1] Brief for Appellees, *Goodman, et al. v. Lukens Steel Co. & United Steelworkers*, Nos. 84-1478 and 84-1509 (3rd Cir.), filed February 6, 1985 (hereinafter referred to as "Plaintiffs' Court of Appeals Brief"), at pp. (xvi)-(xvii). For the convenience of the Court, ten copies of that brief have been lodged with the Clerk of this Court.

[2] *Id.* at 114. Plaintiffs argued for this legal duty in the terms summarized by the brief's argument headings: "Section 1981 Is Violated When A Union Intentionally Chooses Not To Combat Employer Discrimination" (*id.* at 100); "The Language Of Title VII Supports Imposition Of Liability Against A Union for Its Failure To Combat Employer Race Discrimination" (*id.* at 104); "Macklin v. Spector Freight Systems, Inc. And Its Progeny Are Soundly Reasoned And Correctly Decided" (*id.* at 108).

> an employer's acts of race discrimination, the trial court should examine (a) whether the employer has in fact engaged in race discrimination; (b) whether the union knew or should have known of the employer's discriminatory conduct; (c) whether the union failed to combat the discrimination; and (d) whether the union failure was . . . on a class-wide basis. For purposes of determining liability under Section 1981, inquiry into whether the union's failure was intentional is also relevant.
>
> * * *
>
> In every area as to which the trial court found the Unions liable, analysis of each of the relevant factors fully supports the imposition of liability. [*Id.* at 114-15.]

The findings of the trial court—the findings which frame the issue in this Court—have not changed since plaintiffs drafted the passages quoted above. Yet *now* plaintiffs contend that this case does not present the question whether unions have an affirmative duty under Title VII and § 1981 to combat employer discrimination. Now plaintiffs contend that the district court and the court of appeals "simply h[e]ld that unions may not systematically treat complaints of employer racial discrimination differently from other complaints by their members" (Resp. Br. at 15).

Plaintiffs' revisionist characterization of the holdings below cannot withstand analysis. Not surprisingly, in light of the way plaintiffs pleaded and proved their case, neither the evidence, the district court's findings of fact, nor the legal analysis of the courts below supports this characterization.[3]

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[3] Plaintiffs' complaint alleged that the unions had "passively permit[ted] the employer to discriminate against black persons" and had "[f]ailed to act affirmatively to cause the employer to refrain from discriminating against black employees because of race and color" (I JA 7). The complaint also alleged that the unions had discriminated against blacks in processing grievances (*id.*). The district court found that plaintiffs had failed to prove the latter claim. Pet. App. 135a-137a. This finding is the only finding made

a. The courts below did not find that the unions treated the non-discrimination provisions of the contract differently from all the other provisions of the contract.

The linchpin of plaintiffs' new-found characterization of this case is the assertion that the unions treated the non-discrimination provisions of the contract differently from all other provisions of the contract. Plaintiffs' sole proffered support for this assertion is that "[t]here is no evidence that the Unions similarly avoided enforcing any other provision of the collective bargaining agreement" (Resp. Br. at 14); see also *id.* at 18 ("The Unions adduced no evidence that they were reluctant to assert any kind of grievance claim other than racial discrimination; indeed, the 8,000 grievances they filed belie any such claim").

If plaintiffs had sought to make a claim of discrimination in the unions' handling of racial discrimination grievances as opposed to other types of grievances, it would have been plaintiffs' burden to produce evidence of such discrimination. Plaintiffs did not even attempt to carry that burden. And, in the record made, plaintiffs are simply wrong in asserting that there is no evidence that the unions were reluctant to assert grievances under other provisions of the contract. To the contrary, the district court made the following findings on this point:

> Upwards of 8,000 grievances have been filed at Lukens during the limitations period. The steady increase in grievance filings each year has not produced a corresponding increase in the capacity of the grievance-processing system to handle complaints. As a result, the grievance procedures at Lukens are characterized by the following:
>
> a. Serious grievances (*i.e.*, those involving more than a four-day suspension, and those involving discharges) are given priority. And, because each "zone" within the plant handles its grievances sepa-

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by the court with respect to whether the unions themselves had discriminated in the grievance process.

> rately at the early stages, and fourth-step hearings are held only once or twice each month, an attempt is made to allocate the hearing-time among the zones.
>
> * * *
>
> c. In an effort to alleviate the backlog, there has been an increasing tendency on the part of the unions to dispose of less-serious grievances by simply withdrawing them "without prejudice" . . . .
>
> In short, the manner in which the unions handle employee grievances at Lukens does not fully comport with the terms of the collective bargaining agreement, and is subject to legitimate criticism. There is, however, no hard evidence to support an inference that these inadequacies disadvantage blacks to a greater extent than whites. [Pet. App. 135a.][4]

In addition, the district court identified a whole category of claims, available to white and black employees alike, that the unions *never* processed: "the unions have pursued a uniform policy of not filing grievances on behalf of probationary employees *for any reason*" (*id.* at 137a, emphasis added).[5]

The district court, in sum, simply did not find that the unions had singled out the non-discrimination clause for non-enforcement. All that the district court found in this connection is the following: "It is *undisputed* that the unions were *reluctant* to assert racial discrimination as a *basis* for a grievance. . . ." (Pet. App. 138a, emphasis

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[4] See also, U. Br. at 7 n.5.

[5] Under the contract, grievances for probationary employees could be asserted on a wide range of issues having nothing to do with race: for example, wages, overtime, shift differentials and a multitude of other issues involving terms and conditions of employment. Apart from those broad categories of potential grievances, a probationary employee also had a limited contract right to challenge his discharge: before 1974, a probationary employee could challenge a discharge as based on discrimination because of membership in the union; since 1974, a probationary employee could challenge a discharge on grounds of discrimination based on union membership, race, color, creed, national origin, or sex. See U. Br. at 13-15.

added.) What the court meant by this finding is elucidated by consideration of the "undisputed" evidence on which the finding is grounded.

The "undisputed" evidence (indeed the only evidence) supporting this finding is the testimony of a number of union officials—both white and black—as to their approach to handling grievances where an employee claimed to have been the victim of racial discrimination. This testimony established that where a grievance could be based on a provision of the contract other than the nondiscrimination clause, union representatives frequently determined, as a matter of tactics, that they could most effectively represent a grievant by basing the grievance solely on that other clause. The district court understood that such tactical considerations were the source of the unions' "reluctan[ce]":

> In order to establish that a particular grievance had merit, it was necessary to establish a violation of the collective bargaining agreement. If such violation could be established, it was unnecessary to go further, and establish racial animus. And the company tended to "get its back up" and resist any charge of racial discrimination; or at least that was the union's perception of the company's position. [Pet. App. 138a.] [6]

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[6] Plaintiffs' brief suggests that the district court found this explanation to be "pretextual" (Resp. Br. at 13). But the court did *not* so find. Indeed, the court expressly found that it was "the unions' perception" that "the company tended to 'get its back up' and resist any charge of racial discrimination . . . ." Rather than finding the explanation pretextual, the court found the explanation to be "unacceptable" in that it did not fully meet the court's conception of what was necessary to eradicate the employer's discrimination. Moreover, the suggestion that this explanation could have been found pretextual is belied by the fact that it was stated by witnesses, black and white, called by the plaintiffs as well as by the unions, and was not controverted. See, *e.g.*, I JA 157-58, 187, 189-89, 239-40, 247-48, 301-02.

The court did not find or suggest that the unions' "reluctan[ce]" was in any way motivated by race or that it caused blacks to receive "inferior treatment" from the unions (Resp. Br. at 30 n.33). Indeed, the tactical considerations motivating the "reluctan[ce]" concerned *how best to achieve relief for the grievants.*

Most provisions of the contract that establish employee rights set forth an objective standard by which to measure whether the rights have been violated. In many instances, the objective standard necessarily incorporates protection against discrimination. For example, at Lukens almost all situations involving competition between employees—promotions, demotions, transfers, lay-off, recall, overtime, and so on—are governed by employee seniority. A witness who had been involved in negotiation of union agreements going back to the early 1940's testified: "The purpose of the seniority is to avoid discrimination" (I JA 261). "Absent seniority," each of these competitive situations involves the "potential of all kinds of discrimination based on friendship, relationship, religion, sex, race, ethnic background and so forth" (*id.*). When, as here, promotions are governed by seniority, a black employee denied a promotion need not prove he was the victim of discrimination to obtain a remedy through the grievance process, he need only show that he was the senior competitor for that position. "When you violate a person's seniority [for any] reason you violate it" (*id.* at 269). By the same token, if that employee were not the senior competitor, his grievance would not be successful, and an allegation of racial discrimination could not alter that result.

The same point is applicable, for example, to employee grievances concerning wage rates, incentives, shift differentials, leave time, discipline and discharge. As a shop steward called by plaintiffs acknowledged, "if you have a fairly clear case of a contract violation . . . it doesn't add anything to add racial discrimination as well" (I JA 302).

An allegation of racial discrimination is not merely superfluous in such situations; such an allegation may well frustrate obtaining prompt relief for the individual grievant. As one of the named plaintiffs, who served as a union shop steward, testified, "discrimination is a hard thing to prove" (Tr. 12.180-.181; see also I JA 158, 187-189; Tr. 14.55-.56). Thus, to seek to prove discrimination where proof of violation of the grievant's seniority rights would be sufficient to prevail would unduly complicate and delay resolution of the grievance. See U. Br. at 9-10. Moreover, the undisputed evidence here showed that the employer was less willing to settle grievances alleging discrimination. *Id.* Another witness, a class member, testifying for plaintiffs, summed up what the evidence showed to be the common experience:

> [D]uring the years that I was a shop steward[,] I found that I was able to work better by not saying discrimination, but just by proving that they were wrong and getting some records to verify this. [I JA 158.] [7]

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[7] As already stated, the evidence described in text as to the reasons for the unions' "reluctan[ce]" was undisputed, and was given by witnesses for plaintiffs as well as witnesses for the unions. The district court found the unions' motivation to be the tactical considerations just outlined. Pet. App. 138a. Nevertheless, plaintiffs in their brief lift out of context a hypothetical "worst-case" situation postulated by the district court in reasoning to its legal conclusion, and treat that hypothetical as if it were a finding of fact in this case. The district court reasoned: "A union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under both Title VII and § 1981. . . ." (Pet. App. 139a-140a).

The district court said "[a] union," not "these unions," and the evidence here would not have supported the latter. There is no evidence in the record that the unions in this case were motivated by either of the considerations postulated by the Court. The latter of the two hypothetical situations is particularly inconsistent with the facts of this case, given the regular election of blacks to high union offices and their regular selection as repre-

An example cited in plaintiffs' brief in this Court illustrates the points just made. Plaintiffs assert that "[a] particularly striking example [of the unions' failure to assert racial discrimination] is the case of class member Alfred Hicks" (Resp. Br. 12). Hicks was discharged by Lukens allegedly for striking a foreman and for insubordination in connection with that incident. The unions' defense was that Hicks had not committed the offense. At the arbitration hearing, the unions presented five eyewitnesses to support the contention that Hicks had not struck the foreman or been insubordinate. (II JA 467, 473-476). The company presented witnesses who testified to the contrary. If the unions' witnesses were believed, Hicks would prevail. If the unions' witnesses were not believed, Hicks would be found to have struck the foreman and been insubordinate. In either event, the eyewitness testimony would likely control the outcome, and a claim that the discharge was motivated by race discrimination could not likely alter that result. In the Hicks case, the inexperienced assistant grievanceman, a white who testified as a witness for plaintiffs, had wanted to assert race discrimination in the grievance, but he was overruled by a black union official, who was the chairman of the unions' grievance committee—the local's top grievance-processing official (I JA 207, 299-300). The assistant grievanceman acknowledged that "[t]his was just an honest disagreement [of] opinion as to what were the best tactics to use" (I JA 300). Based on the testimony of the eyewitnesses, the arbitrator found that there had not been a fight as such, but that Hicks had been insubordinate,

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sentatives in negotiations as well as in the grievance procedure (see U. Br. at 7), and given the accomplishment by the unions of significant improvements for blacks. See, *e.g.*, U. Br. at 10, 16-17.

The court of appeals termed the passage in question in the district court's opinion a "comment[]" (Pet. App. 25a). Whatever it is, it is not a finding of fact in this case. In short, while we do not disagree that a union that "avoids asserting discrimination claims . . . in deference to the perceived desires of its white membership" could well violate Title VII and § 1981, that is not this case.

and ordered Hicks reinstated without back pay (II JA 477-479).[8]

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[8] Another example cited in plaintiffs' brief (Resp. Br. at 11)—the union's strategy regarding the employer's tests—also illustrates the point. See U. Br. at 12-13.

Plaintiffs' witnesses testified to about a dozen occasions in the period from 1967 to 1980 in which a black employee complained of perceived race discrimination and the union representative failed to include a claim of race discrimination in a grievance. See, e.g., I JA 146-147, 299-301; II JA 392-393, 455-501; Tr. 5.190-.191. The record contains about twice as many occasions over the same period when a grievance filed by the unions contained an allegation of racial discrimination. See U. Br. at 8 n.8. Plaintiffs quibble with some of the examples included by the unions in the latter category because even though the grievant was black and the grievance alleged "discrimination" the unions failed to use the term "racial discrimination" (Resp. Br. at 10 n.12). Plaintiffs also would discount race discrimination grievances filed after 1974 (*id.*). Since the period from 1975-1980 constitutes approximately half the total period for which the unions have been found liable, one wonders how plaintiffs can question the relevance of evidence of union conduct from 1975-1980. Plaintiffs cannot cling to the finding of union liability for that period and at the same time assert that what the unions did during that period should not be considered.

In this regard, it should be understood that the number of grievances alleging racial discrimination identified in the record of this case hardly constitutes the universe of such grievances. Because, as the district court found, "the unions' records on grievances are filed by grievance number," and not by subject matter, no party was able to put together a complete compilation of the number of grievances alleging racial discrimination (Pet. App. 136a-137a). Moreover, the record contains examples of grievances that obviously invoked the non-discrimination clause but that did not use the word "discrimination"—*e.g.*, a grievance complaining that a black employee was called "boy" by his foreman (Tr. 12.196-.197). There is no way of knowing how many such grievances were filed.

Plaintiffs suggest that it is somehow significant in this connection that over the period 1967 to 1980 the unions filed over 8,000 grievances that presumably did not allege racial discrimination. But even plaintiffs would concede that every day at this plant employees, black and white, had many complaints against their employer that had nothing to do with race discrimination. See U. Br. at 7-8 and notes 6 & 7.

Plaintiffs' assertions that the unions were classifying grievances according to race or taking race into account in processing grievances are thus not borne out by the findings or the evidence in this case. The unions did what lawyers do in assessing which claims to assert on behalf of a client. A lawyer who decides as a matter of tactics to allege a simple contract violation and not to allege a violation of one of the civil rights laws is not engaging in racial discrimination. The same is true when a union representative makes a comparable litigation judgment. Alleging race discrimination is not the same as protecting employees from race discrimination, nor is it necessarily the best way to accomplish that objective. Title VII and § 1981 protect people, not contract clauses.[9]

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[9] Plaintiffs begin their brief in this Court with a recitation of racist incidents at Lukens and of certain discriminatory practices of the employer that occurred before the statute of limitations in this case. Resp. Br. 5-9. Regrettably, there is no question that racism existed at Lukens and that over the years the employer engaged in a number of discriminatory practices. However, it should be noted that in these pages of their brief, plaintiffs do not cite *a single act of discrimination committed by the unions.* (Plaintiffs, at Resp. Br. 6, refer to a racist remark allegedly made to a paralegal working for plaintiffs' lawyers, which the paralegal attributed to "[a] union official referred to as Maldy" (I JA 50); the trial court made no finding on this point, perhaps because the record did not show who "Maldy" was and whether he was in fact a union official.)

The undisputed evidence shows that from the time the unions organized Lukens in the late 1930's, blacks have been active participants in the unions and have been involved in leadership positions. See Pet. App. 71a; U. Br. 7. Indeed, black organizers were instrumental in the initial organization of the unions (I JA 159, 285; Tr. 260-61). From the beginning, in a town where meetings were generally open only to members of one race, union meetings were always integrated (Tr. 22, 56-57, 25.11); indeed, in the beginning, the unions were the only organization in town to which blacks and whites both belonged (Tr. 22.55-56, 22.77).

Without going into more detail, the point here is simply that unlike other institutions of the time, the unions' history was not one of racism. And, the district court rejected both of plaintiffs' claims that the unions had themselves engaged in discrimination: the court found that the unions had not negotiated the seniority system for

b. The courts below did not find that the unions were placing special burdens on blacks, giving blacks inferior treatment, denying blacks equal access to, and protection of, the grievance process, or engaging in any other form of discriminatory treatment of blacks.

The district court's problem with the unions' "reluctan[ce]" to assert the non-discrimination clause as a basis for grievances was not that this "reluctan[ce]" constituted—or was motivated by—racial discrimination by the unions, or that by their "reluctan[ce]" the unions were placing special burdens on blacks, giving blacks inferior treatment, or denying blacks "equal access to, and protection of, . . . the grievance system" (Resp. Br. at 30). The court made no such findings. To the contrary, the court concluded that the grievance process worked equally well for blacks as for whites (Pet. App. 135a-137a). Indeed, the court's opinion makes clear that the unions through grievances based on provisions other than the non-discrimination clause were successful in combatting employer discrimination in a number of areas—*e.g.*, discharges of nonprobationary employees, work assignments, shift differentials and overtime (Pet. App. 93a, 101a).

Instead, the district court's problem with the unions' "reluctan[ce]" was that the court believed that had the unions adopted a different strategy—that of regularly basing grievances on the non-discrimination clause—the unions might have mitigated more generally the employer's propensity to discriminate: in the court's words, "it seems obvious that vigorous pursuit of claims of racial discrimination would have focused attention upon racial issues and compelled some change in racial attitudes" (Pet. App. 138a).[10] Thus, the crux of the district court's

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discriminatory purposes, and had not discriminated in the processing of grievances. Pet. App. 70a-71a; 135a-137a.

[10] The court also stated that the unions' approach was "unacceptable" because it failed to deal adequately with instances of racial harassment that "involve no loss of pay or permanent disciplinary record" (Pet. App. 138a). We showed in our opening brief that because the court of appeals vacated the district court's underlying

determination was that the unions failed to give "vigorous pursuit [to] claims of racial discrimination"; and the harm that resulted from that failure was that attention was not "focused . . . upon racial issues" and as a result "attitudes" were not changed. This conclusion—not discrimination by the unions—is the basis for the finding of union liability in this case.

Plaintiffs emphasize that the district court found "more than mere passivity on the part of the unions" (Resp. Br. at 3). But the "more" that the court found was union knowledge of employer discrimination and the "re-

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finding that racial harassment at Lukens was a class-wide problem, the unions' liability for not combatting such discrimination is not before this Court (U. Br. 10-11 n.11). Plaintiffs contend that, because "Union officials *admitted* that they had a practice of treating grievances alleging racial discrimination differently from other grievances," the court of appeals did not vacate the finding of union liability with respect to combatting racial harassment (Resp. Br. 4 n.6). The court of appeals made no such ruling.

Moreover, each of the following considerations belies plaintiffs' contention in this regard. First, as already discussed, *supra* at 4-11, union officials did *not* admit any such differential treatment. Second, no union official "admitted" to any reluctance to assert race discrimination where there is no other satisfactory basis for a grievance, which would be the situation in the category of racial harassment grievances now under discussion. Third, because of the action taken by the court of appeals in vacating the racial harassment claim, that court had no occasion to consider, *inter alia*, the following arguments made by the unions: (i) During the period 1967 to 1980, the evidence shows only 13 instances of alleged racial harassment that were brought to the attention of the unions; in 10 of those instances, the unions took action, including the filing of grievances, in the victim's behalf (U. Br. 11, n.11). (ii) The unions had negotiated an alternative mechanism to the grievance process that was particularly well suited to handling racial issues involving no loss of pay or disciplinary record: the joint labor-management civil rights committee. See, *e.g.*, I JA 247; II JA 592-603, 706-709. Indeed, a class member, who was called as a witness by plaintiffs, testified that in his position as a union shop steward he had been instructed by other union officials that if he has "a complaint of race discrimination which [he] can't handle in the shop, that the appropriate course of action is to refer it to the Civil Rights Committee" (I JA 64).

luctan[ce]" notwithstanding that knowledge to assert racial discrimination as a basis for grievances. If the unions had no affirmative duty to assert racial discrimination as such in grievances, then a knowing determination not to do so was not violative of the law. The "more" that the court found does not change the issue. The issue remains whether the unions had that affirmative duty.

Plaintiffs point to the fact that in setting forth its "Conclusions," the district court used the label "discriminat[ion]" to apply to the unions' "failure" to combat employer discrimination—specifically, to the unions' failure to make extensive use of the non-discrimination clause in the processing of grievances. Pet. App. 147a. But in light of the court's findings of fact, and of the undisputed evidence, that label can only mean that the court used the term "discrimination" to encompass a union's knowing failure to challenge employer discrimination. The label that a court puts on its findings does not alter the essential character of those findings.

Indeed, in their brief to the court of appeals, plaintiffs manifested their understanding that the district court had used the term "discrimination" to refer to the unions' failure to combat employer discrimination. And plaintiffs urged that the court of appeals adopt the same definition of discrimination. Thus, relying on *Dickerson v. United States Steel Corp.*, 472 F. Supp. 1304, 1353 (E.D. Pa. 1978), plaintiffs argued to the court of appeals that:

> "a union's acquiescence in discriminatory company conduct" is actionable under Section 1981 because a "union's failure to negotiate for non-discriminatory contract terms or to protest discriminatory treatment *is in itself discrimination.*" 472 F. Supp. at 1353. The Unions can point to not a single District Court or Court of Appeals case that rejects this theory. [Plaintiffs' Court of Appeals Brief at 101 (emphasis added); see also Resp. Br. 36 n.36.]

Plaintiffs' brief below argued that this concept of "discrimination" also justified a conclusion, which the district

court had not stated, that the unions' failure to combat employer discrimination was a violation of § 703(c)(1) of Title VII:

> The Unions' conduct in this case was violative of *both* Sections 703(c)(3) and 703(c)(1). Their refusal to process race discrimination grievances, in the face of clear employer discrimination, was not only a "cause" of employer discrimination, but in itself independently constituted discriminatory behavior.
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> * * *
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> [H]owever one interprets Section 703(c)(3), Section 703(c)(1) must be interpreted as imposing liability on unions for any kind of discrimination—both active and passive—on the basis of race. [Plaintiffs' Court of Appeals Brief at 105, 108 (emphasis in original).]

The court of appeals picked up on the definition of discrimination urged by plaintiffs, stating that "[t]he deliberate choice not to [assert race discrimination in] grievances also violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation," and that "[t]he district court's finding of intentional discrimination properly supports the claims under § 1981 as well" (Pet. App. 26a-27a). See U. Br. at 26, n.22. The court of appeals did not purport to alter or overturn any finding of fact of the district court. The court of appeals did not conclude—and the district court's findings would not have allowed the conclusion—that the unions classified grievances according to race, put special burdens on blacks in the grievance process, gave inferior treatment to black grievances, or any of the variations on those themes repeated throughout plaintiffs' brief in this Court.

Plaintiffs now claim that the court of appeals' words quoted above mean something more than, or different from, the meaning plaintiffs urged upon the court of appeals. But, once again, whatever label is put on it, the union conduct at issue here is a failure to take cer-

tain affirmative steps to combat employer discrimination —specifically the unions' "reluctan[ce]" to assert race discrimination as a basis for grievances. See U. Br. at 18-19, 20. Either the unions had an affirmative duty under Title VII and § 1981 to take such steps, or they did not. Calling the unions' failure to fulfill that duty "discrimination" does not change the issue.

In a subsequent decision, the Third Circuit has left no doubt as to the purport of its holding in the instant case. Thus, in *Com. of Pa. v. Local Union 542, Intern. Union*, 807 F.2d 330, 338 (3rd Cir. 1986), the court of appeals ascribed to its decision in the instant case the very meaning that plaintiffs now seek to disclaim—*i.e.*, that if a union obtains information that an employer is discriminating,

> it will owe an affirmative duty to its minority members to take action against the offending employer or employers to enforce the non-discrimination provisions of its collective bargaining agreements. *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985).

2. *Respondents brief misapprehends the applicable legal standards.* As we have shown, this case is about whether the unions had an affirmative duty to combat employer discrimination, and if so whether the unions failed to satisfy that duty. Accordingly, virtually all of the legal arguments offered in plaintiffs' brief are beside the point. Plaintiffs make only scant efforts to support the theory of union liability adopted by the courts below.[11] Nevertheless, we address certain arguments made by plaintiffs because discussion of these arguments helps focus the proper analysis in this case.

Plaintiffs assert that it would violate Title VII and § 1981 for a union, once having negotiated a contract

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[11] Plaintiffs address that issue only in the second paragraph of footnote 24 and in footnote 26 of their brief. The points made in our opening brief include complete responses to the contentions in these footnotes.

with a non-discrimination provision, to determine to give enforcement of that provision a lower priority than other provisions in the agreement. Obviously, we agree that a union could not make such a determination for racially discriminatory reasons, just as a union may not base any decision respecting its members on racially discriminatory reasons. But—although it is not this case [12]—we do not agree that a union is not permitted to determine, for legitimate reasons apart from race, that enforcement of a non-discrimination provision should be given a lower priority than enforcement of other provisions.

There are legitimate reasons for such a choice. Under the national labor laws, a union is not required to process every grievance that may be meritorious. *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 742 (1981). In the area of enforcing contracts, as in other aspects of a union's representative function, a union is free to make judgments and to set priorities based on what it deems to be in the collective interests of its members. *Id.* at 742. Discrimination grievances are singularly difficult to prove. The mass of statistical and anecdotal evidence the plaintiffs produced in this case is not different from what a union would have to produce if it tried to prove similar claims in the arbitration process—and the union would have to do so without any right of discovery. See *Alexander v. Gardner-Denver*, 415 U.S. 36, 57-59 (1974). A union is entitled to decide that such grievances are too great a drain on its resources in light of other pressing needs of its members, particularly given that—unlike most other employee concerns—the victims of discrimination have an alternative means, through the civil rights laws, to secure full relief. That unions are to

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[12] Here the undisputed evidence and the findings of the district court establish not that the unions gave a lower priority to fighting employer discrimination, but that the unions often made the tactical choice—in the interests of achieving full and expeditious relief for individual black grievants—to attack such discrimination through a grievance based on a provision other than the non-discrimination clause. See *supra* at 4-11.

determine their own priorities in such matters is at the heart of our system of labor relations. See U. Br. at 34-45.[13]

The cases on which plaintiffs rely, *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), and *Hunter v. Erickson*, 393 U.S. 385 (1969), are not to the contrary. In those cases, this Court found that the governmental entities involved had established a skewed decision-making process which made it harder to adopt certain laws benefiting minorities than to adopt other laws. In *Hunter* the Court found that "[o]nly laws to end housing discrimination based on 'race, color, national origin or ancestry' must run [the procedural] gantlet" established by the provision at issue. 393 U.S. at 390. The Court concluded that,

> the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size. [393 U.S. at 393.]

And, in *Seattle School Dist.*, the Court found that the initiative in question "uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." 458 U.S. at 470; see also, *id.* at 474, 480 n.23.

Thus, both of these cases dealt with a racial skew in the structure of decision-making, not with the priorities ultimately chosen by government through an unskewed decision-making structure. Neither case compels governmental entities to give equal priority to racially identifiable interests in enacting laws or in enforcing existing

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[13] The duty of fair representation, which plaintiffs' brief discusses at 33 n.38, does not require that a union make particular judgments or set particular priorities. "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). See U. Br. at 39.

laws. Indeed, both cases made clear that if the governmental entities in question determined, through a process that is not racially biased, to repeal or decline to enact legislation remedying disadvantages suffered by minorities, such determinations would not be improper. 458 U.S. at 483 ("the simple repeal or modification of desegregation or antidiscrimination laws without more, never has been viewed as embodying a presumptively invalid racial classification"); 393 U.S. 390 n.5; see also 393 U.S. at 394-95 (Harlan, J., concurring).

By the same reasoning, a union that does not have a racially biased decision-making process is under no compulsion to give equal priority to racially identifiable interests in setting its priorities in the grievance or negotiation process.[14] Union decisions as to how best to allocate their enforcement resources, or how best to process particular grievances, are akin to the kinds of decisions made regularly by governmental prosecutorial or civil law enforcement agencies. Decisions of this type that are not made for improper reasons are not improper on a theory that there is an alternative approach that would give a higher priority to concerns unique to minorities.

Plaintiffs are simply wrong when they suggests that Title VII requires unions to place combatting employer discrimination as "a matter of highest priority" (Resp. Br. at 29). Title VII clearly makes it a matter of "highest priority" that unions not *engage* in discrimination. § 703(c)(1) and (2). But, as to a union's responsibility respecting employer discrimination, Title VII requires only that a union not "cause or attempt to cause an employer to discriminate." § 703(c)(3); see U. Br. at 25-34. That provision is far from requiring unions to

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[14] An analogy to *Hunter* and *Seattle School Dist.* in the union context would be a union constitution or by-law providing that ratification of a contract term having particular benefit for minorities must be accomplished by a vote of a greater proportion of members than would be required for ratification of other kinds of contract provisions.

place the highest, or even a high, priority on combatting employer discrimination.[15]

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our opening brief, the findings of liability against the unions in this case should be reversed.

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[15] Plaintiffs, in a footnote near the end of their brief, suggest that the decisions below may be justified on a disparate impact theory because the unions' "reluctan[ce]" to combat the employer's discrimination served to "perpetuate" that discrimination. Resp. Br. at 23-24, n.25. Plaintiffs did not raise or argue such a theory below. Neither court purported to base the unions' liability on such a ground. In any event, such an argument would read § 703(c)(3) out of the statute. In the sense that plaintiffs use the term, any union decision to put other priorities ahead of combatting employer discrimination would have the effect of "perpetuating" the employer's discrimination. Thus, if plaintiffs' argument were correct, a union would be liable under Title VII for any race-neutral decision that draws resources away from fighting an employer's discrimination. The Congress that addressed union liability for employer conduct with the language "cause or attempt to cause" plainly did not intend such a result.

No. 85-2010

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Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC), LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC) and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC),

Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, and UNITED POLITICAL ACTION COMMITTEE OF CHESTER COUNTY, DAVID DANTZLER, JR., JOHN R. HICKS, III, DOCK L. MEEKS, individually and on behalf of others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE WOMEN'S LEGAL DEFENSE FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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No. 85-2010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC), LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC) and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC),

Petitioners,

v.

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, and UNITED POLITICAL ACTION COMMITTEE OF CHESTER COUNTY, DAVID DANTZLER, JR., JOHN R. HICKS, III, DOCK L. MEEKS, individually and on behalf of others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE WOMEN'S LEGAL DEFENSE FUND AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

CONSENT OF PARTIES

Petitioners and respondents have consented to the filing of this brief. Petitioners' letter of consent is being filed herewith. Respondents' letter of consent has been filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights. The national office of the Lawyers' Committee and its local offices have represented the interests of blacks, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of municipal services and school desegregation. Over one thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association and other leading lawyers, have assisted the Lawyers' Committee in such efforts.

The National Association for the Advancement of Colored People is a New York nonprofit membership corporation. Its principal aims and objectives include promoting equality of rights and eradicating caste or race prejudice among the citizens of the United States and securing for them increased opportunities for employment according to their ability.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by the Constitution and the laws of the United States.

The Mexican American Legal Defense and Educational Fund is a national civil rights organization established in 1967. Its principal object is to secure through litigation and education, the civil rights of Hispanics living in the United States.

The Women's Legal Defense Fund ("WLDF") is a nonprofit organization founded in 1971 to advance women's rights. It represents women in employment discrimination litigation, operates an employment discrimination counseling program, conducts public education and represents women's interests before the Equal Employment Opportunity Commission and other Federal agencies. A major priority for WLDF is its Employment Rights Project for Women of Color.

Amici have a direct interest in the law governing the construction and application of the civil rights statutes. Amici and those individuals whom amici represent litigate under these statutes regularly and thus have a strong incentive to prevent diminution of the statutes' powers as sources of redress for civil rights violations.

STATEMENT OF THE CASE

Amici Curiae incorporate the Statement of the Case submitted by respondents herein.

SUMMARY OF ARGUMENT

The pervasive flaw in the arguments put forth in the briefs of petitioners and the Solicitor General is that they set out and attempt to resolve issues that are not now before this Court. The narrow question presented here is if a union, when requested by its minority membership to process meritorious racial grievances, refuses to do so solely because those grievances are based upon racial discrimination, does that union violate Sections 703(c)(1) and (3) of Title VII ("Section 703(c)" or "Title VII") and 42 U.S.C. § 1981 ("Section 1981").

Holding a union liable under Title VII and Section 1981 for its deliberate decisions not to attempt to eliminate employer discrimination prohibited by the collective-bargaining agreement is consistent with national labor policy. It grants to a

union's minority membership the added protection of temperance of a policy principled upon majority rule. Even under the National Labor Relations Act, where a union is the certified collective-bargaining agent for its membership, that union has a duty fairly to represent each union member in negotiating a collective-bargaining agreement and in enforcing that agreement equally for all members. The National Labor Relations Board has determined that deliberate failure to process racial grievances is a breach of that duty. At a minimum, practices that violate that duty should be prohibited under Title VII and Section 1981.

Thus, this Court's affirmance of the decision of the Court of Appeals for the Third Circuit would create no significant additional burdens or obligations because most of those suggested herein already exist under the National Labor Relations Act. Moreover, squarely confronting an employer with racial discrimination grievances will persuade the employer to end discriminatory practices and will result in fewer grievances for the union to process overall.

The clear purpose of Title VII and the Civil Rights Act of 1866 (which includes Section 1981), is to eliminate discrimination and the harmful effects of decades of discriminatory practices. Deterrence of discrimination can best be effected if discriminatory conduct is brought out in the open. Grievances that ignore the motivating factor of discrimination in the conduct complained of, while they may serve to repair some of the damage done to a single individual, cure merely the symptom, but not the disease. Charges of discrimination stigmatize the individuals at whom they are aimed, making it more likely that unlawful practices will be terminated. When a union singles out meritorious racial grievances for less favorable treatment than all other meritorious grievances, it not only engages in illegal discrimination itself, but it also causes the perpetuation of illegal discrimination by the employer.

In litigating cases against employers with union contracts, Amici herein have repeatedly encountered the same factual

pattern as the instant case. There is virtually always a collective-bargaining agreement with a nondiscrimination clause, but most of the unions have never processed a single claim under the nondiscrimination provisions, and have engaged in the practice of characterizing discrimination claims as some form of nonracial grievance or otherwise not processing the claims at all. These practices have, in fact, done nothing to eliminate entrenched patterns of discrimination; litigation against the employer was still necessary.

When a union seeks piecemeal relief for individual members by processing "seniority" grievances where possible, in the long run that union wastes, rather than preserves, its valuable resources. As long as a union refuses to bring employer discrimination out into the open, discrimination will continue. Thus, ignoring the underlying problem will result in a treadmill of "seniority" or other such claims. This lawsuit is a perfect example of how fighting the symptom is not enough. Unless the curative measures are aimed at the disease of discrimination, the ultimate goal of Title VII can never be fulfilled. There will always be another "seniority" grievance to process.

ARGUMENT

I. THE UNIONS' DISCRIMINATORY FAILURE TO PROCESS RACIAL GRIEVANCES VIOLATED TITLE VII AND SECTION 1981.

The unions repeatedly argue that they are not vicariously liable for the discriminatory employment practices of Lukens. Petitioners' Brief at 25-26.[1] However, that was not the issue before either the District Court or the Court of Appeals, nor is it the issue now before this Court.

Here the question is whether the discriminatory conduct of the unions, found to be racially motivated, violated the rights of

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[1] Hereinafter "Pet. Br. at". References to the Brief of the United States as Amicus Curiae are "U.S. Br. at".

respondents and created union liability under Section 703(c) of Title VII[2] and Section 1981.[3] Amici submit the answer to that question is yes.

A. Under Title VII A Union Cannot Treat The Right To Freedom From Discrimination Less Favorably Than Other Rights Secured Under A Collective-Bargaining Agreement.

Petitioners make the unsupported statement that the only section of Title VII applicable to the issues herein is Section 703(c)(3), and that the unions cannot be held to have

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[2] Section 703(c) provides:

"§ 2000e-2. Unlawful employment practices

". . .

"(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

42 U.S.C. § 2000e-2 (1982).

[3] Section 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of the laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. § 1981 (1982).

"caused" Lukens' discriminatory practices in violation of that section. Pet. Br. at 25-26. Their argument fails on two counts. First, any time a union takes affirmative steps toward avoiding confrontation with an employer on the issue of racial discrimination, that union contributes to the perpetuation of the employer's discriminatory conduct in violation of Section 703(c)(3). Second, deliberately deciding not to process racial grievances protected by Title VII in favor of the promotion of other rights secured under a collective-bargaining agreement is discrimination itself and violates Section 703(c)(1)[4] as well.[5]

In choosing to process some, but not all, of the grievances raised by union members, a union naturally treats some types of claims differently from others. Where this type of selective practice is adopted, this Court has set forth the test to determine whether the procedure constitutes a discriminatory and unlawful employment practice under Title VII. "The ultimate factual issues are thus simply whether there was a pattern or practice of such disparate treatment and, if so, whether the differences were 'racially premised'." *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 (1977) (quoting *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 805 n.18 (1973)).

Almost every Federal court that has addressed the issue has held that under Title VII it is a union's responsibility to take an active role in eliminating discrimination where it has the

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[4] From the commencement of this litigation, respondents herein asserted claims under both Sections 703(c)(1) and (3) in the District Court. That court found that the union had discriminated against the plaintiff class and that such practices cause perpetuation of employer discrimination. *See Goodman v. Lukens Steel Co.,* 580 F. Supp. 1114, 1160 (E.D. Pa. 1984) ("The clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment."), *aff'd in part, rev'd in part, vacated in part,* 777 F.2d 113 (3d Cir. 1985), *cert. granted,* 107 S. Ct. 568 (1986).

[5] It is questionable whether any procedure that disfavors Federal rights is lawful. *Cf. Burnett v. Grattan,* 468 U.S. 42, 53 n.15 (1984).

power to do so.[6] The seminal case, upon which the courts below relied, is *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973). There the court held:

> "Where a union has not done so and where there is such solid evidence of employer discrimination as is alleged here, it would undermine Title VII's attempt to impose responsibility on both unions and employers to hold that union passivity at the negotiating table in such circumstances cannot constitute a violation of the Act."

Id. at 989.

The arguments put forth in both the petitioners' brief[7] and the Solicitor General's brief,[8] misstate the basic issue and ignore the findings of fact of the District Court:

> "[T]he evidence in this case proves far more than mere passivity on the part of the unions. The distinction to be observed is between a union which, through lethargy or inefficiency simply fails to perceive problems or is inattentive to their possible solution . . . and a union which, aware of racial discrimination against some of its members, fails to protect their interests."

Goodman, 580 F. Supp. at 1160; and the Court of Appeals affirmed echoing portions of the District Court opinion. *See* 777 F.2d at 126.

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[6] *See Howard v. International Molders and Allied Workers Union, AFL-CIO-CLC, Local # 100*, 779 F.2d 1546, 1553 (11th Cir.) (unions liable under Section 703(c)(3) for failing to make reasonable effort to end employer's use of racially discriminatory nonvalid tests for promotions), *cert. denied*, 106 S. Ct. 2092 (1986); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982) (Title VII and Section 1981 impose upon a union an affirmative obligation to oppose employment discrimination against its membership), *cert. denied*, 467 U.S. 1251 (1984); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973); *Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252 (N.D. Ind. 1977).

[7] *See* Pet. Br. at 26 (describing the issue as the "question of union responsibility for employer discrimination").

[8] *See* U.S. Br. at 10 (describing respondents' theory as holding the unions liable for their "passive acquiescence in discrimination by the employer").

The unions argue that they were justified in refusing to process racial grievances because they could get effective relief if they categorized such grievances as "seniority" or other nondiscrimination claims. *See* Pet. Br. at 42-43. The District Court, the Court of Appeals and the *Macklin* line of cases do not agree with the unions. Disparate treatment by unions of all grievances that if processed could help eliminate discriminatory employment practices is discrimination in violation of Title VII.[9]

Moreover, a union's deliberate refusal to assist its members in eliminating discrimination encourages and allows an employer to continue discriminatory employment practices. *See Chrapliwy v. Uniroyal, Inc.*, 458 F. Supp. 252, 261 (N.D. Ind. 1977) (holding that Title VII places an affirmative duty on labor unions to eliminate discrimination).

Regardless of whether this case is scrutinized under Section 703(c)(1), prohibiting union discrimination, or Section 703(c)(3), prohibiting a union from causing an employer's discrimination, liability will lie under Title VII. Given the broad remedial intent of Title VII, it is in complete accord with the spirit of that legislation to hold the unions liable for discriminatory conduct that singles out for nonprocessing grievances based upon racial discrimination.

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[9] Moreover, the unions' argument fails completely with respect to probationary employees whose rights under the collective-bargaining agreement are virtually nonexistent. *See Goodman*, 580 F. Supp. at 1159. Since 1965, the collective-bargaining agreement at issue before this Court has included a provision prohibiting employers from discriminating against probationary employees. *See id.* Discrimination is virtually the only legitimate ground upon which a probationary employee may challenge employer conduct, and the probationary employee can only make such a challenge if the union files a grievance. Thus, the unions' policy of never filing a grievance on behalf of a probationary employee, *see id.*, is simply another way of avoiding their obligation to combat discrimination. Although respondents did not raise the issue below, the unions' treatment of probationary employees could be violative of Section 703(c)(2) prohibiting classification of members in a way that would deprive the individual of employment opportunities.

B. The Unions' Deliberate Refusal To Process Racial Grievances Violated Section 1981.

Both the unions and the Solicitor General argue that *General Bldg. Contractors Ass'n v. Pennsylvania,* 458 U.S. 375 (1982), is controlling and that the case proves that Section 1981 "provide[s] no basis for holding a union liable for discriminatory conduct of an employer". Pet. Br. at 45; *see* U.S. Br. at 25. In *General Bldg.*, this Court overturned a finding of an employer's liability under Section 1981 for a union's discrimination because the District Court had found a violation on proof of disparate impact alone and not upon proof of intentional discrimination. Additionally, the employer therein had no knowledge of the union's discriminatory practices. 458 U.S. at 383.

In sharp contrast to *General Bldg.*, the District Court herein found the unions guilty of deliberate and racially motivated conduct sufficient to give rise to liability under Section 1981. *See Goodman,* 580 F. Supp. at 1160 (holding the unions liable after noting that if racial animus is properly inferable there is liability under Section 1981). The District Court summed it up:

> "A union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under both Title II [sic] and § 1981, regardless of whether, as a subjective matter, its leaders were favorably disposed toward minorities."

Id. The Court of Appeals affirmed; the necessary implication is that the findings of the District Court were not clearly erroneous. *See Anderson v. City of Bessemer City,* 470 U.S. 564, 566 (1985) ("a District Court's finding of discriminatory intent . . . is a factual finding that may be overturned on appeal only if it is clearly erroneous"); *Pullman-Standard v. Swint,* 456 U.S. 273, 287 (1982) (Fed. R. Civ. P. 52(a) does not differentiate among categories of findings and, therefore, finding of discriminatory intent must be clearly erroneous to be overturned). *See generally* Fed. R. Civ. P. 52(a).

II. UNION LIABILITY UNDER SECTION 1981 AND TITLE VII FOR REFUSAL TO FIGHT EMPLOYER DISCRIMINATION IS CONSISTENT WITH NATIONAL LABOR RELATIONS POLICIES.

Petitioners and the Solicitor General argue that requiring a union to take a more active role in the fight against employment discrimination will somehow undermine the national labor policies embodied in the National Labor Relations Act ("NLRA"). To the contrary, the Title VII and Section 1981 obligations outlined in this case are wholly consistent with one of the basic principles of the NLRA—the union's duty of fair representation of all members.

A. Construing Title VII And Section 1981 To Prohibit A Union From Discrimination In The Processing Of Members' Grievances Is Consistent With The Duty Of Fair Representation.

This Court has held that a union, as the exclusive bargaining agent of the employees, has a duty fairly to represent all employees in both the negotiation and the enforcement of a collective-bargaining agreement. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967). That duty is breached "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith". *Id.* at 190. Where the discrimination constituting a breach of the duty of fair representation is against one of the groups enumerated in Title VII, then Title VII is violated as well.

The pattern in the Federal courts has been that at least where the duty of fair representation is breached by a union's failure fairly to represent one of the classes enumerated in Section 703(c)(1) or (3), then Title VII is also violated. *See, e.g., Macklin*, 478 F.2d at 989.[10] The interpretation of Title VII and Section 1981 urged upon the Court would serve as an

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[10] *See generally* Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 719-24 (1980) (decisions holding unions liable under Title VII for inaction based on facts that would constitute breach of duty of fair representation).

added incentive for unions to adhere to their preexisting obligations.[11]

Contrary to contentions made by petitioners and the United States, respondents herein are not urging this Court to render a decision that requires a union to commence a Title VII action every time an employer discriminates against one of its members. The question here is actually much narrower than that: Whether a union, which is the sole certified collective-bargaining agent responsible for processing arbitrable grievances, may single out and refuse to process meritorious grievances when requested to do so by their aggrieved members simply because those grievances are based upon racial discrimination.

The unions' responsibilities to combat discrimination arise not only from Title VII but also from a collective-bargaining agreement that provides that Lukens must maintain a policy of nondiscrimination toward employees. The unions are obligated fairly to enforce that agreement, and the nondiscrimination provision therein. Under the national labor policy that principle is embodied in the duty of fair representation. Civil rights policy prohibits a union from discriminating,[12] or from causing an employer to discriminate.[13] That policy is embodied in Title VII and Section 1981.

The purposes of Title VII, Section 1981 and the duty of fair representation have always been focused on eliminating dis-

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[11] Although respondents did not assert a claim under the NLRA, the Court of Appeals held that:

> "The district court found that the unions intentionally avoided asserting claims of discrimination. In doing so, the unions violated the duty of fair representation owed to their members. *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944); *see also*, Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702 (1980)."

Goodman, 777 F.2d at 127 (parallel citations omitted).

[12] *See* Section 703(c)(1); Section 1981.

[13] *See* Section 703(c)(3).

crimination. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), the Court held:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

And just as Title VII and Section 1981 arose out of a demonstrated need to wipe out the last vestiges of discrimination, so too:

> "The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act . . . ."

Vaca v. Sipes, 386 U.S. at 177 (citing *Steele*, 323 U.S. at 192 and *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213-14 (1944)). More recently this Court has held that "national labor policy embodies the principle of nondiscrimination as a matter of highest priority . . . ." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 66 (1975) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)). How could Title VII and Section 1981 be offensive to a doctrine that arose out of the same problems and maintains the same goal?

B. Requiring A Union To Meet Its Obligations Under Title VII And Section 1981 Imposes No Excessive Burdens Upon Unions.

The unions claim that they will face substantial hardships if forced to prosecute all racial grievances. *See* Pet. Br. at 44. This argument fails for three reasons.

First, a union is never required to process all grievances brought by its members. *Cf. Vaca v. Sipes*, 386 U.S. at 191 ("frivolous grievances are ended prior to the most costly and

time-consuming step in the grievance procedures"). Under Title VII, Section 1981 and the duty of fair representation, nonmeritorious claims should not be processed.

Second, as noted above, because the unions are already required by the duty of fair representation to pursue a course of conduct in compliance with Title VII and Section 1981, few additional burdens would be placed on the unions' resources.

Third, the argument is inapplicable to the facts herein. The District Court found that the unions refused to process racial grievances for reasons other than lack of their resources. The District Court held the unions liable because they intentionally singled out for nonprocessing discrimination claims "either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership". *Goodman,* 580 F. Supp. at 1160. Moreover, the unions recognized some of the claims as meritorious, and processed them; but they refused to identify the claims as racial grievances. Other claims they refused to process at all.[14] But for the unions' insistence on treating known acts of discrimination as isolated, nonracial events, the pattern of discrimination might have been ended long ago. As a result of their insistence, there have instead had to be fourteen years of litigation in the Federal courts.

III. A UNION MAY NOT COMPROMISE RIGHTS SECURED BY TITLE VII OR SECTION 1981.

Petitioners contend that their right to refuse to process meritorious racial grievances stems from the unions' right to "determine their own bargaining agendas and their own priorities and make their own compromises and agreements". Pet. Br. at 37.

In *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417-18 (1975), this Court held that the elimination of discrimination

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[14] *See* discussion regarding probationary employees at footnote 7, *supra.*

had to be part of the union's agenda, whether the union wanted it to be or not. This Court stated:

> "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' "

Id. at 417-18 (quoting *United States v. N. L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)).

In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), two white Teamsters were dismissed for misappropriating company property. A third and equally guilty accomplice, who was black, was not discharged. One of the discharged employees brought a Title VII action against the Teamsters Union. The union moved to dismiss on the ground that "in representing all the affected employees in their relations with the employer, the union may necessarily have to compromise by securing retention of only some". 427 U.S. at 284-85. This Court rejected that argument stating:

> "The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them."

Id. at 285.

In *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975), this Court discussed the relationship between the union's duty to represent the majority and the

union's obligations to prevent discrimination against its membership:

> "In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests . . . Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit."

Id. at 64 (citing *Vaca v. Sipes*, 386 U.S. 171 and *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944)). This Court then acknowledged two cases wherein the National Labor Relations Board imposed upon a union the obligation to take action against discrimination. *See id.* (citing *Hughes Tool Co.*, 147 N.L.R.B. 1573 (1964) (failure to process racial grievances in violation of duty of fair representation is an unfair labor practice) and *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America v. NLRB*, 368 F.2d 12 (5th Cir. 1966) (Board ordered union to propose in collective-bargaining specific contractual provisions to prohibit racial discrimination), *cert. denied*, 389 U.S. 837 (1967)). It makes little sense that the union would not be liable under Title VII—legislation enacted to correct the injustice caused by decades of "majority rule"—for the same conduct that would violate the duty of fair representation under the NLRA.

The fundamental principle of *Emporium* is that the union and not the aggrieved member is the proper party to present racial discrimination grievances to the employer for arbitration. Aside from holding that the collective-bargaining agreement precluded minority factions from going straight to the employer, this Court highlighted why the union is the better candidate:

> "The collective-bargaining agreement involved here prohibited without qualification all manner of invidious discrimination and made any claimed violation a grievable issue. The grievance procedure is directed precisely at determining whether discrimination has occurred. . . . Nor

> is there any reason to believe that the processing of grievances is inherently limited to the correction of individual cases of discrimination."

Id. at 66 (footnotes omitted). This Court recognized not only that the union would be more effective than the individual at processing racial discrimination claims, but also that a united front is more capable of eliminating overall discrimination.

In *Emporium,* this Court described the national labor policy as "long and consistent adherence to the principle of exclusive representation tempered by safeguards for the protection of minority interests". *Id.* at 65. The effect of Title VII and Section 1981 of deterring unions from deliberately refusing to challenge known patterns of discrimination—even though requested to do so by aggrieved members—is one of those safeguards.

IV. DISCRIMINATION CAN BE EFFECTIVELY ELIMINATED ONLY IF IT IS EXPOSED.

Petitioners cannot avoid Title VII liability by arguing that the unions brought claims for wrongs other than discrimination when presented by members with complaints of discrimination. Allowing a union repeatedly to classify racial discrimination claims as nonracial grievances would undermine Title VII's purpose of deterring discrimination.

A central purpose of Title VII is to deter discrimination. *See Bibbs v. Block,* 778 F.2d 1318, 1324 (8th Cir. 1985) (" 'by proving unlawful discrimination, appellant prevailed on a significant issue in the litigation' . . . and thereby vindicated a major purpose of Title VII, the rooting out and deterrence of job discrimination") (citation omitted); *Diaz v. American Tel. & Tel.,* 752 F.2d 1356, 1360 (9th Cir. 1985) ("[i]t is, of course, true that Title VII was designed to deter and remedy discrimination on the basis of group characteristics and to remove barriers that favor certain groups over others"); *Stamford Bd.*

of Educ. v. Stamford Educ. Ass'n, 697 F.2d 70, 73 (2d Cir. 1982) ("public policy goals of Title VII, for example, are to deter discrimination by reason of sex and to compensate aggrieved persons for the injuries caused to them by reason of the discrimination") (footnote omitted); *Thompson v. Sawyer,* 678 F.2d 257, 291 (D.C. Cir. 1982) ("Title VII relief is to be targeted to deter illegal discrimination and to compensate its victims"); *Rich v. Martin Marietta Corp.,* 522 F.2d 333, 342 (10th Cir. 1975) ("objects and purposes of Title VII . . . are to achieve equality of employment opportunity and to deter discriminatory practices").

Courts have explicitly discussed and fashioned Title VII doctrine in terms of deterrence of future discrimination. *See Albemarle Paper Co. v. Moody,* 422 U.S. at 417-18; *Toney v. Block,* 705 F.2d 1364, 1373 (D.C. Cir. 1983) (employer required to prove by clear and convincing evidence that there is no basis for backpay, and employee can get ruling on liability even where there are no damages) (Tamm, J., concurring in result); *EEOC v. Local 638 . . . Local 28, Sheet Metal Workers' Int'l Ass'n,* 532 F.2d 821, 832 (2d Cir. 1976) (back pay); *Reeder-Baker v. Lincoln Nat'l Corp.,* 649 F. Supp. 647, 663 (N.D. Ind. 1986) (punitive damages); *Stephenson v. Simon,* 448 F. Supp. 708, 709 (D.D.C. 1978) (attorneys' fees); *Altman v. Stevens Fashion Fabrics,* 441 F. Supp. 1318, 1321 (N.D. Cal. 1977) (individual liability of officers).

Title VII's utility as a deterrent to discrimination will be undercut if Title VII claims are regularly characterized merely as claims for wrongs other than discrimination. Obviously, a deterrent scheme only works if people know it exists and is being enforced. Thus, in the context of a Fourth Amendment exclusionary rule case, this Court has noted that the "concept of effective deterrence assumes that the police officer knows the probable consequences of a presumably impermissible course of conduct". *Nix v. Williams,* 467 U.S. 431, 445 (1984) (quoting *United States v. Ceccolini,* 435 U.S. 268, 283 (1978) (Burger, C.J., concurring in judgment)).

The foregoing is consistent with the District Court's statements that:

> "[I]t seems obvious that vigorous pursuit of claims of racial discrimination would have focused attention upon racial issues and compelled some change in racial attitudes. The clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate the discriminatory environment. In short, the unions' unwillingness to assert racial discrimination claims as such rendered the non-discrimination clause in the collective bargaining agreement a dead letter."

Goodman, 580 F. Supp. at 1160. The unions' failure to focus that attention resulted not only in the perpetuation of Lukens' discriminatory employment practices, but also in demonstrated ambivalence and prejudice from class plaintiffs' white co-workers.[15]

Upon submission of the bill that became Title VII to the Judiciary Committee of the House of Representatives, Rep. Dawson explained the need for deterrent legislation:

> "Racial discrimination harms not only the person against whom it is directed, but also scars the mind and morals of those who indulge or acquiesce in it. In addition, the country as a whole is weakened because substantial numbers of its people are thus deprived of adequate education, employment, recreation, voting participation, and other essentials of our national life to which all citizens ought to contribute to the maximum of their abilities."

110 Cong. Rec. 2732 (1964).

The facts of this case amply demonstrate the continuing harm caused by discrimination and the sensitivity of the lower courts to redress that condition. Before the commencement of

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[15] "Plaintiffs presented a mass of evidence of individual instances of racial harassment and/or discriminatory treatment." *Goodman,* 580 F. Supp. at 1147. The incidents ranged from obscene statements to derogatory graffiti to demonstrated Ku Klux Klan activities. *See generally id.* at 1147-51.

this lawsuit, minority employees were discriminated against by Lukens, harassed by co-workers and denied assistance from their union in processing their grievances. Despite the unions' attempts to secure relief by processing nonracial grievances on behalf of victims of discrimination, the discrimination and the harassment continued. Since this lawsuit, Lukens has agreed to a settlement and the unions have processed significantly more racial grievances; one must assume that, because of the pendency of this action and the relief awarded by the lower courts, racial harassment at Lukens has subsided.

If the unions had taken earlier action and assisted their members in fighting discrimination, far less harm would have visited the class plaintiffs herein. Had the unions acted as Congress intended they act, discrimination at Lukens could have been eliminated long ago without the need for fourteen years of litigation or the involvement of this Court.

CONCLUSION

The judgment for the Court of Appeals for the Third Circuit should be affirmed.

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